THE TRIAL

OF

GENERAL TH. J. SUTHERLAND,

LATE OF THE PATRIOT ARMY,

BEFORE A COURT MARTIAL

CONVENED AT TORONTO ON THE 13TH DAY OF MARCH, A. D. 1838.
BY ORDER OF SIR FRANCIS BOND HEAD, LIEUTENANT
GOVERNOR OF SAID PROVINCE,
K. C. B. &c. &c. &c.

ON A CHARGE OF HAVING, AS A CITIZEN OF THE UNITED STATES, LEVIED WAR IN THE PROVINCE OF UPPER CANADA AGAINST HER MAJESTY THE QUEEN OF GREAT BRITAIN, &c.

WITH HIS DEFENCE

AND OTHER DOCUMENTS.

BUFFALO:
PRESS OF OLIVER G. STEELE.
1838.

1838
(69)

DISTRICT OF MICHIGAN, TO WIT:

BE IT REMEMBERED, that on the second day of June, Anno Domini one thousand eight hundred and thirty-eight, LAURA SUTHERLAND, of the said District, hath deposited in this office the Title of a Book, the title of which is in the words following, to wit:

"The Trial of General Th. J. Sutherland, late of the Patriot Army, &c., before a Court Martial convened at Toronto, on the 13th day of March, A. D. 1838; by order of Francis Bond Head, Lieutenant Governor of said Province, K. C. B. &c. &c. &., on a charge of having, as a citizen of the United States, levied war in the province of Upper Canada, against Her Majesty the Queen of Great Britain, &c.; with his defence. New York, 1838."

The right whereof she claims as proprietor, in conformity with an Act of Congress, entitled "An Act to amend the several Acts respecting copy rights"

JNO. WINDER, *Clerk of the District.*

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TRIAL

OF

GENERAL TH. J. SUTHERLAND.

FOURTH DAY.

MONDAY, MARCH 19, 1838.

THE Court met pursuant to adjournment. Present the same members as on Saturday. Dr. Sedingham was again called—who states that the prisoner is fit to be brought before the Court. The prisoner Thomas Jefferson Sutherland, was then brought into Court, and was asked by the Judge Advocate if he had any objection to make to any member of the Court, when he answered—"As it is only within the last half hour that Mr. Ridout has been applied to, to aid me in my defence—I crave that the Court will adjourn a reasonable time to enable me to shape more particularly the objections I wish to make before this Court Martial."

The Court was then cleared, and re-opened; on the prisoners' being brought in, he was acquainted that he must *now make* any specific objection he may now desire to make.

The Prisoner then made the following objections:

First—That Major Dewson is on full pay in the British Army—and therefore, not, within the spirit or meaning of the Act, competent to sit on this Court Martial, required to be composed exclusively of Militia Officers. And

Second—That the President has never sat upon a Court Martial.

The Court was again cleared, and re-opened, and the prisoner was informed that the Court overruled the objections.

The President then asked the prisoner whether he was guilty or not guilty, to which he answered "not guilty."

John Prince, Lieut. Colonel in the Militia of Upper Canada, being duly sworn on the Holy Evangelists, states to the Court:

That on the *fourth day of March*, instant, he was returning from Gorfield, in the Western District, was travelling in a sleigh along the shores of Lake Erie on the Canada side, about half past four o'clock, P. M. he saw at a great distance two objects on the ice, which he thought were men: was in company with Captain Girty and Mr. Haggerty, and they had been with him on Point Pele' Island on the preceding day, with the forces under the command of Colonel Maitland. In about *twenty minutes* after he had seen the objects he saw that they were men *coming from the Michigan shore towards the Canada shore;* conceiving them to be spies he determined to intercept them if possible, and having met people who accommodated him and Mr. Haggerty with fresh horses and sleighs, Mr. Haggerty got into one of the sleighs and witness into another; having previously prevailed on Mr. Girty, who was unwell and his horses tired, to remain where he was. They drove on, witness first, followed by Mr. Haggerty; when witness came within about a hundred yards of the prisoner, who had another person with him, of the name of Spencer, he desired the man who drove him to stop and take charge of his, witnesses' pistols. He also left in the sleigh a tomahawk which he had and advanced towards the prisoners, following them and having his gun. He desired Mr. Haggerty to follow with his gun also.—He was about fifty yards ahead of Mr. Haggerty when he hailed the prisoner and his companion, and desired them to halt. They did so, and the prisoner Sutherland asked "*what do you want, we are American citizens going about our business.*" As witness advanced he recognised Mr. Sutherland, and said that *they were some of the people he had been long looking for*, or words to that effect; on their turning round he discovered that they had swords, and *advanced towards Mr. Sutherland and took his sword from him*; at that moment Mr. Haggerty came up, when witness desired Mr. Haggerty to demand the sword of Sutherland's companion, he did demand it, and Spencer gave it up to him. Witness then demanded of both if they had any fire arms about them, *they assured him they had not, when witness said he would be satisfied with that assurance and would not search them.* He then told them to consider themselves as his prisoners, and to march before him to the sleighs which were at some distance. Mr. Sutherland then *charged witness with having taken them on the American waters.* Witness told him to look at our shore, and at the American shore from whence he came, and he told him to bear in mind that they were about a mile and a half from the Canada shore, while they were about five or six miles from the American shore. Prisoner then stated that he thought he had a right over any

of the waters of Lake Erie, or words to that effect. He then desired that witness would take him before his commanding officer and he expressed a hope that he should not be used ill by us. Witness told him that he should be taken before the commanding officer, and should not be ill treated. *Witness wished the Court distinctly to understand that the place where he captured the prisoner, was not above a mile and a half from the Canada shore, and it was on that part of Lake Erie which belongs to the British government. He also wishes the Court distinctly to understand that it was at least five miles from the American shore.* Witness also wishes the Court to understand that the swords were both very efficient swords, and they wore them as military men usually do. Witness had seen Mr. Sutherland at Detroit some time previous to that day, about six weeks previous, and a few days after the capture of the schooner Ann of Detroit. He had then a sword by his side, which witness believes to be the same which he took from him. He also wore a military dress with a tri-colored cockade in his hat. After Mr. Sutherland became the witnesses' prisoner, they proceeded in sleighs to Malden, where witness placed him in charge of the Honorable Colonel Maitland, then commanding there.

On the following day, being Monday, and Col. Maitland having expressed his determination to send both the prisoners down to Toronto, and the prisoner Sutherland having the preceding day expressed a wish to make a communication to them, witness arranged with Colonel Maitland that the prisoners should be brought before him, this witness, *Major Lachlan*, and *Captain Prideaux Girty*, Esqs. all of whom were magistrates in the Western District. The prisoner Sutherland was in consequence brought before them about midday, in a room in the garrison where any body who pleased was allowed to enter, and the room was filled with military men and civilians. The prisoner Sutherland was brought in first, and alone, apart from his companion; witness then reminded him of his having expressed a wish to make a communication to them; witness stated that he and his brother magistrates were ready to receive any information he may choose to give, at the same time reminding him that he need not say any thing which would criminate himself. He said he was aware of that, and that he would frankly tell us all he knew. He then made a voluntary statement which witness heard throughout. After he, the prisoner, had made this statement, witness reduced the substance of it into writing in his presence. Witness also produced a newspaper, (which newspaper he here handed into the Court, being the "Detroit Morning Post," dated the 12th of January, 1838,) the paper containing the prisoner Sutherland's despatches and proclamations, but that some of them were written for effect. When

witness had finished the statement abovementioned, which he now holds in his hand, he read it deliberately over to the prisoner, and asked him if it was substantially true—he said it was.

Here the witnesss delivered the statement to the Judge Advocate, who read it, when it was referred to the Appendix.

Witness here also delivered to the Judge Advocate the newspaper abovementioned, who read the publications stated in the declaration of Mr. Sutherland, and referred it to the Appendix.

Witness also recollects a statement made by Mr. Sutherland when he was taken prisoner, which witness desires may now be taken down. After Mr. Sutherland stated that "they were American citizens going about their business," *witness remarked that Americans had no business there in these times*, when prisoner replied, that "*he was going to Lower Sandusky to endeavor to intercept some persons who had stolen some money from him, and his clothes and valise while he was in Monroe.*" Witness then remarked that he was coming in a direct line from the American to the Canadian shore, and witness here adds, that he was then at least one mile at this side of the line leading to Sandusky, and their steps were directed towards the Canada shore. Witness adds that a line from where the prisoners were taken to Sandusky, would run in about a *south westerly* course, as far as he can judge, and that they, the prisoners, were going in a course about *south easterly* he thinks, and if they had pursued the course they had been travelling, they would have been on the Canada shore in about half an hour. Witness states positively that the prisoner is the same person he saw at Detroit, and whom he took prisoner on the ice.

Sutherland. Were you, at the time I was arrested, in a certain degree of excitement?

Answer. *I was excited in a little degree with pleasure on finding a man whom I had desired to meet. I was excited with pleasure, but nothing else.*

Suth. Might you not have mistaken what was said by Mr. Spencer at the time of the arrest, and after, for what had been said by me?

Ans. Certainly not. Mr. Spencer said nothing that I heard except his asking me whether he was bound to deliver his sword to Mr. Haggerty, when he demanded it by my order, and I have no recollect of any thing else said by Mr. Spencer on that occasion.

Suth. Did Mr. Spencer on that occasion say that we were on American ground?

Ans. Not in my hearing—I never heard him say so.

Suth. Was it not Sandusky instead of Lower Sandusky, that was named?

Ans. No. Lower Sandusky was the place named, certainly.

Suth. When arrested, *did I not tell you that we were going to a Schooner that was near, for the night?*

Ans. He did not say so when arrested, *but he said so in about twenty minutes after*, and I observed on the improbability of the act, *because the Schooner had been stranded in the ice all the winter, a long distance from the shore, and without any body or any fuel on board.*

Suth. How did you know that there were neither persons nor fuel on board?

Ans. I never stated that I did know that there was nothing on board of her, but I had seen her in the same position, blocked up in the ice, about a month before, and I took it for granted, that there were neither persons or fuel on board of her, and I believe there were not.

Suth. Where did you first see the schooner?

Ans. I first saw the schooner in the place where she was when I captured Mr. Sutherland, *and that place is within the province of Upper Canada, and not within the waters of the United States.*

Suth. How far were we from the schooner at the time of the arrest?

Ans. Within half a mile.

Suth. Did I not say to you that I supposed she was on Ar[illegible]n ground?

Ans. I do not recollect any thing of the kind being said. tainly was not said to me.

Suth. How near were you to the schooner the first time y[illegible] her?

Ans. I was on the main land, travelling on the Canadian side.

Suth. Was there more than one schooner frozen in the ice in that vicinage?

Ans. There was one about four miles below, close upon the Canadian shore in the Township of Colchester, I believe, *and they were the only two I saw frozen up in the lake.*

Suth. Had there been any others, were you likely to have seen them?

Ans. If there had been any others in that vicinity, within three or four miles of the schooners spoken of, I should have seen them.

Suth. Had not the ice been broken up between the Canada shore and the American shore above the schooner, a short time before my arrest?

Ans. It is impossible for me to say whether it was or was not broken, not having been in the neighbourhood in the time mentioned, at that time I was either at Sandwich where I reside, and which is twenty miles distant, or I was in Toronto.

Suth. How many miles below Amherstburgh were you when you first discovered the prisoners?

Ans. As far as I can judge from memory, *about nine miles.*

Suth. How long a time elapsed after seeing the prisoners, before you commenced following them?

Ans. *I think about twenty minutes.*

Suth. Was witness above or below the prisoners, as to the current, when he left the Canada shore?

Ans. *I was above them.*

Suth. Were not Mr. Spencer and myself within three miles or less of an island in the vicinity of the schooner at the time of the arrest?

Ans. Certainly not, as far as I know. The only island with which I am acquainted, is *Bois Blanc*, and that, I think, must be *seven or eight miles from the schooner.*

Suth. To what point of land on the American shore were we nearest when arrested?

Ans. I am not sufficiently acquainted with the American shore to answer that question positively, but I think it must be at or below Gibralter, in Michigan.

Suth. To what point of land on the Canada shore were we most near when arrested?

Ans. There is no particular name that I can give to the point of land nearest to the spot where I arrested the prisoners, but I think it must have been about *two or three miles below a place called Hartley's point.*

At four o'clock, P. M. the President adjourned the Court until ten A. M. to-morrow.

FIFTH DAY.

TUESDAY, MARCH 20, 1838.

The Court met pursuant to adjournment. Present, the same members as yesterday.

Sutherland. What is the distance between Amherstburgh and Monroe in Michigan?

Answer. *What the distance across the river is I cannot tell*, but I believe the distance between the American shore opposite to Amherstburgh and Monroe, is about twenty-five miles.

Suth. When you overtook me were we on the north or south side of such line between Amherstburgh and Michigan, and if on the south, what distance on the south?

Ans. It is impossible for me to answer that question without reference to a map; but I believe the prisoner was not on the south side but on the east side of that line.

The Judge Advocate here produced a map from the Surveyor General's office, and called up the Surveyor General to prove the same as being part of the records of his office. The Honorable John Macawley was then called, and he produced certain sheets of the copy of a map shewing the line of demarcation between Upper Canada and the United States of America, as laid down by the commissioners under the treaty of Ghent. He then withdrew.

Suth. What is the nearest land to which the schooner lay?

Ans. The nearest land was the Canada shore, but I am unable to designate the place for want of a name to it.

Suth. Was it not within the prisoner's power to have crossed over to the American side of the line before you could have taken them?

Ans. I can only give an opinion on that point, but I am of opinion that they could not.

Suth. At what distance might the prisoners have seen you approaching them?

Ans. They might have seen me from the time I left the shore in pursuit of them, if they had been on the look out.

Suth. Did prisoner before the examination spoken of by witness, say to witness he had any communication to make to him?

Ans. *He did not say so to me personally.*

Suth. At the time of the examination spoken of at Amherstburgh, on the 5th instant, did not prisoner say that he had been on Navy Island with Mackenzie and Van Rensselaer, and that he had left them in disgust, or because he was entirely dissatisfied with all their proceedings; and that after he had left them, Mackenzie became one of his bitterest enemies?

Ans. The prisoner certainly did at Amherstburgh, say that he had been on Navy Island with Van Rensselaer and Mackenzie, and that he was dissatisfied or disgusted with Mackenzie; but he made no such remark with respect to Van Rensselaer, nor do I recollect that he said that Mackenzie had become one of his bitterest enemies. The prisoner expressed dissatisfaction with Mackenzie as to his military arrangements on the Island. He, the prisoner, also stated, that Mackenzie had been plotting against him on Navy Island.

Suth. Did the prisoner say he left Navy Island before the commencement of any hostile operations?

Ans. I have no recollection of his having said so. But he stated he was second in command under General Van Rensselaer, and I think he said he left the Island before the destruction of the Caroline. I think he stated also that he left on or about the 26th of December.

Suth. Did prisoner state on his examination that he had employed or joined persons or a party at Cleveland, Ohio, with whom he came on to Gibralter: or did he state to witness that he, prisoner, came on from Cleveland in the same boat with a party of armed men who came at their own instance, and whose passage was paid by citizens of Cleveland?

Ans. I remember nothing that passed on that occasion more than what is contained in the written statement before the Court. It is not an examination, but it contains a voluntary statement of the prisoner.

Suth. Did not prisoner tell witness on said examination that the paper read to him though substantially correct, did not contain the explanations prisoner had given; to which witness replied, that it would take too much time and paper to put it all down?

Ans. I said nothing of the kind, but when I had read over the statement, I asked him if he wished to add any thing more, and he stated that if he was aware of the exact position he stood in, with regard to us, he might be induced to offer his services to us; which

left an impression upon my mind that he was desirous of enlisting in our cause against the Americans—for he said that he had made up his mind not to put his foot again upon American soil if he could avoid it—or words to that effect. All this was said by the prisoner after the statement had been read over to him by me, and I looked upon it as a conversational remark and therefore did not add it to the statement.

Suth. Did witness or any other person on said examination, ask prisoner to sign the paper produced and alleged to contain the statement of prisoner?

Ans. I did not ask him to sign it, nor did any other person in my presence. In my practice as a magistrate, I generally take down the statements of prisoners and read over and explain them to the prisoners, and make a minute at the foot of what they state, after having had the same read over and explained to them—and I never ask them to sign them.

Suth. Has witness ever examined the sword taken from prisoner—if so, describe it?

Ans. I have examined the sword and it is a *tawdry Yankee sword.* It is remarkably sharp at the end—sharper than swords generally are, and appeared to have been recently ground and whetted. The scabbard is washed or plated white, with devices on the outside—*and as he has asked me to describe it, I add that it is of so fine and paltry a character, that I believe a British officer would feel himself disgraced by wearing it.* I consider it to be efficient to thrust with.

The witness here was directed to withdraw, and he withdrew accordingly.

Prideaux Girty, of the township of Gorfield in the Western District of Upper Canada, Esquire, and a Captain in the first regiment of Essex militia, having been duly sworn, states to the Court:

That on the fourth instant I was returning from Point Pele' Island with Colonel Prince, and a man named Haggerty with us. When we were about a mile and a half above Big Creek, which is six miles below Amherstburgh, Colonel Prince said that *there were two objects on the ice.* We drove on still towards Amherstburgh, perhaps the distance of a mile. *We then discovered that they were two men.* I mentioned to Col. Prince that I suspected they were persons wishing to avoid our guard, they being entirely below the usual place of crossing, and recommended that we should pursue and ascertain who they were. We drove a short distance from the main to the American shore. We then turned round and concluded to go up to Anderson's, at Hartley's point, to obtain a fresh horse, and as they were approaching our shore we thought they would be upon it by the time we returned, and if they were not that we might pursue them. But we

found that they were so near the shore *and meeting two single sleighs the Colonel asked them if they would go out with them, that is, with him and Mr. Haggerty.* They went into the sleighs and drove off rapidly. I for a few moments halted at that place with my sleigh, and as I thought *I discovered that the persons were running I drove after them.* I was perhaps at *the distance of a quarter of a mile in the rear : at the distance of a mile and a quarter, or not more than a mile and a half from the Canada shore.* Col. Prince came up with the persons we were pursuing. *I perceived that the Colonel at that moment took a sword from the hands* of the largest man of the two, whom I afterwards ascertained was the prisoner Mr. Sutherland.—Haggerty went up to the smaller man and took his sword ; his I also saw. Colonels Prince and Haggerty with the two men then returned ; immediately when they met us, the Colonel said "Girty, we have Gen. Sutherland." I immediately said, I know the young man who is with you, having seen him at Pontiac, at the head of a company of what they call the Patriot army. I consider the distance from the Canada shore nearest to where I then was, and directly thence to the American shore, to be about eight miles from shore to shore ; some call it ten miles. On the nineteenth of February I attended the theatre at Detroit, and there saw the prisoner, Sutherland, being the first time I ever saw him to my knowledge. On my entering the theatre, I saw him addressing the persons then present, encouraging the cause of the Patriots, so called by him, inviting his hearers to come forward for the relief of the oppressed Canadians. Such was the terms of his address. I left the theatre before the usual time of their dismissal. Next morning I went to Pontiac, and thence to Ann Arbour, and thence to Ypsilanti. I then went to Amherstburgh, and returned immediately to Monroe from Ypsilanti, on Friday evening the twenty-third, where I saw Mr. Sutherland. That evening there was a number of the persons calling themselves patriots, in the taverns of the village. The next morning I saw Mr. Sutherland in the street. I immediately left the place and proceeded towards Amherstburgh, following up the rear of the Patriot army, until they crossed to Fighting Island, when I returned to Gibralter and crossed the river to Amherstburgh, where I gave information of what I saw to Colonel Maitland. I did not again see Mr. Sutherland until he was taken on the ice.

On the morning of the fifth, I went with Col. Prince and Major Lachlan to the Fort, when Mr. Sutherland was brought before us. The Colonel then asked him some questions, and cautioned him particularly not to say any thing that would militate against him. He then stated : "Gentlemen, I will tell you frankly"—and stated that he had been on Navy Island, and was second in command at that

place. That he had, at a certain date which I do not now recollect, left Navy Island, and came up to Cleveland, and from that up to Gibralter, in Michigan, nearly opposite Amherstburgh. He also confessed, that he was with them, the Patriots, in a scow or boat of which they had four or five, on the night of the eighth of January, that he had the direction of them. That there had been some disagreeement among them as to who should command. Witness states here, that he saw these boats come up to the corner of Bois Blanc Island, and he saw two discharges of cannon which took place from the boat. The prisoner further stated that he landed on the morning of the ninth of January, on Bois Blanc Island, at the head of fifty three men.

At four o'clock, P. M., the President adjourned the Court till ten A. M., to-morrow.

SIXTH DAY.

WEDNESDAY, MARCH 21, 1838.

The Court met pursuant to adjournment. Present, the same members as yesterday.

Prideaux Girty, Esquire, again called, who continued his evidence.

The examination of Mr. Sutherland was here put into the hands of this witness, who states that it is the same taken by Col. Prince, at Amherstburgh in witness' presence; that Colonel Prince read it over to the prisoner, and asked him if it was correct, and he admitted that it was.

Witness was one of the magistrates attending upon that occasion, and says that his name at the foot thereof is his proper signature.

Court. How long have you lived in the Western District, and are you acquainted with the country about Amherstburgh, and if so, state what you know about it?

Ans. I was born in the township of Malden in the Western District within two miles and a quarter of Amherstburgh, and have lived there for about thirty years of my life. I am well acquainted with the coast along to Point Pele', and in particular that part about two

and a half miles below where I live, *called Bar point, also called Hartley's Point, which is the nearest road on the Canada shore to where the prisoner was taken, and Point Monille is the nearest point on the American shore. To the best of my belief and to be within limits, I state the distance from where the prisoner was taken to Point Monille at four miles and a half*, also it is usually said to be about eight miles from shore to shore. *I again state that the distance from the Canada shore to where prisoner was taken, is within a mile and a half.*

Sutherland. At what hour of the day did the arrest take place.

Answer. I think it was between four and five o'clock in the afternoon.

Suth. At the time of the arrest, did you observe a schooner frozen in, and if so, what distance were you from that schooner?

Ans. I saw a schooner *I should judge about two miles or very near that.*

Suth. Did you see any other schooner in that vicinity, or near where the arrest took place?

Ans. I did not.

Suth. Was there not a travelled road on the ice between Point Monille and Bar Point?

Ans. Not in that direction.

Suth. Did you see an island near the schooner, and what direction did the island bear from it, and how far distant from the schooner?

Ans. I did not see an Island. *There is no Island nearer the schooner than Bois Blanc, or Square Island, which are more than four miles from the schooner.*

Suth. Is not the West Sister (island) to be seen from three miles below Hartley's point, or from where the schooner lay?

Ans. In a very clear day you can discover it with the eye. It is not less than fifteen miles distant from Hartley's point.

Suth. After you started in pursuit what was your course on the ice after prisoner, and what length of time elapsed before he was overtaken or met by Mr. Prince?

Ans. It was nearly in a southerly direction. I think it could not be more than ten minutes from the time Mr. Prince got into the sleigh he met, until he overtook the prisoner.

Suth. Was prisoner running or only walking, when in all probability or to the best of your impression, he must have seen Mr. Prince and those in pursuit of him?

Ans. I was under the impression that the prisoners did run for more than a quarter of a mile.

Suth. At what house did you see prisoner on the Friday evening you mention at Monroe?

Ans. At a publick inn, I do not remember the name.

Suth. You say you followed the Patriot army from Monroe up towards Fighting Island, did you then or after see prisoner with the Patriot army, or do you know of his having any connexion with them after you saw him at Monroe ?

Ans. I did not see him with the Patriot army between Monroe and Fighting Island. I do not know that he had any connexion with the Patriot army after I saw him at Monroe.

Suth. Did witness see a one horse sleigh cross the ice from the Canada to the American shore, and stop with prisoner and his companion on the ice ?

Ans. No.

Suth. Was it not a clear sunshiny day when prisoner was arrested ?

Ans. It was a tolerably clear or fair afternoon.

Suth. At the time of said examination did not prisoner tell witness that at some time in the early part of February last, he had resolved to have no more to do with the Patriots of Upper Canada, as he then believed he had been deceived as to the intentions of the people of Upper Canada, and had made a formal resignation to them, and made the same known in Michigan, and that he had then determined to write a book for publication, giving a true account of the proceedings of the Patriots of Upper Canada—or words to that effect ?

Ans. After the statement was made and signed by the magistrates, he spoke to this effect. That he had resigned—that he was going east to write a book—that if he knew how he stood with us he might be useful to us, which left an impression upon my mind that he wished to be Queen's evidence ; and also to the effect that he had been deceived as to the intentions of the people of Upper Canada.

Suth. At the time of said examination, in answer to Col. Prince, did prisoner tell witness that he had had no connexion whatever with the persons who had been in arms on Fighting Island or on Point Pele' Island—that he was not aware of having ever seen any of the persons said to have been on Pele' Island, except Capt. Van Rensselaer—and that prisoner had never in his life been at or near Pele' Island—or did you ever hear me make such statement.

Ans. Witness does not recollect that Col. Prince ever asked him such a question, nor does he recollect that any one else put such a question on that occasion. He thinks that while he was on the ice after having taken him, that he had asked him if he had not been on Fighting Island—he answered "No." Witness asked him then whether he knew the persons who had been shot on Point Pele' island. He said he did not know any other than Captain Van Rennsselaer.

This witness then withdrew.

Mathew Hayes, of the city of Toronto, a laborer, and a native of Ireland was called and duly sworn ; and he states as follows :

I went to Navy Island on the twenty-first of December, 1837, after I got there, Mr. W. L. Mackenzie asked me what brought me there, I told him I came for the purpose of seeing the Island. Mr. Mackenzie then told me that I could not leave the Island. I saw the prisoner on the beach when I landed. There was a Mr. Gorham, who, I understand, came from New Market in Upper Canada; he told me himself that he came from New Market. Mr. Gorham acted as Aid de camp to Gen. Van Rensselaer. I saw the prisoner on the Island from time to time, from the twenty-first to the twenty-eighth or twenty-ninth, I cannot be positive which. He was in the capacity of second in command of what they call the patriot forces. He was Brigadier General. I saw him leave the Island, it may have been the 28th or 29th of December, but I am not positive as to the day.—He carried a cavalry sword slung in the usual form. There were no people in uniform on the island. Those on the island were generally armed with guns, swords, pistols and pikes. Some had charge of cannon. The prisoner addressed the men on the island the day he left it, and gave up the command he held to Major Vreeland, who then took his place. Prisoner said "they were embarked in a glorious cause," and implored the God of battles to direct and prosper them.

Court. Have you seen the prisoner since you left the Island—if so, state when ?

Ans. I have not, until I saw him now in Court.

Court. Did you see any other British subjects whose names you did not know ?

Ans. There were about forty or fifty persons whom witness understood were British subjects, many of them told him so, *and he had opportunities of conversing with them, and he had no doubt of their being British subjects.*

Court. Did they form a part of the hostile force ?

Ans. Yes.

Court. Did you recollect a man named Switzer on the island ?

Ans. I do not recollect any man there by that name.

Suth. Did witness ever, or at any time, see prisoner in conversation with W. L. Mackenzie, on Navy Island ?

Ans. Yes.

Suth. At what place on the island, and what was the subject of the conversation ?

Ans. I saw him in conversation with you at the place called Head Quarters, but the subject of the conversation I know not.

Suth. Did you, witness, see prisoner on Navy Island after the burning of the steamboat Caroline?

Ans. No.

Suth. Where on Navy Island did you say you first saw prisoner, and were there any peculiar circumstances in the meeting—if so, state them?

Ans. On the beach at the usual place of landing on the island, opposite Head Quarters, and as to peculiar circumstances there were none that I know of.

Suth. Where on Navy Island did you first enter into conversation with prisoner, and what was the subject of that conversation?

Ans. On the beach opposite Head Quarters. What occurred in conversation I do not recollect.

Suth. Who was in command of Navy Island while prisoner was there?

Ans. General Van Rensselaer, but he was sometimes absent and then the prisoner commanded.

Suth. Does witness know what countryman Gen. Van Rensselaer was? or if or not he was a subject of Great Britain.

Ans. I understood he was an American—that is, a citizen of the United States.

Suth. Were there any batteries on Navy Island at the time you say prisoner left it?

Ans. There was one on the western extremity of the island.

Suth. Does the witness know, of his own knowledge, of Gen. Van Rensselaer being absent from Navy Island between the 21st and 29th of December last—and if so, does he know that the absence of Gen. Van Rensselaer was known to the prisoner at the time—and if so, on what days of the said month of December, was Gen. Van Rensselaer absent from the island.

Ani. He was absent to my knowledge. I heard prisoner himself say that the General was absent. I stopped in the quarters with the prisoner and thus I came to know. I cannot well remember the particular days.

At four o'clock, P. M., the President adjourned the Court until ten A. M., to-morrow.

SEVENTH DAY.

THURSDAY, MARCH, 22, 1838.

The Court met pursuant to adjournment. Present, the same members as yesterday.

Mathew Hayes, was again called.

Suth. To what shore did prisoner go from Navy Island, when he left—the shore of New-York or Canada?

Ans. To the American shore.

Suth. Did you learn from W. L. Mackenzie that he was on bad terms or unfriendly to prisoner, at and before prisoner left Navy Island?

Ans. No I did not.

Suth. Did you learn from prisoner while he was on Navy Island, that he was unfriendly to Mackenzie, or that he had any difference with him?

Ans. No I did not.

Suth. Do you know that W. L. Mackenzie had said to prisoner on Navy Island, that he, Mackenzie, wished prisoner to go off the Island, or clear out and leave them, or words to that effect?

Ans. No, I do not recollect any thing of the kind. I never heard it mentioned.

Suth. How, or from whom, or by whom, were the provisions and stores used by the persons on Navy Island procured or furnished?

Ans. I understood they were furnished by American citizens.—They were brought to Navy Island from the American shore. They were brought both by Americans and Canadians who went from the island for them. Provisions were so brought to the island, during the time prisoner was on the island.

Suth. What Canadians brought provisions to Navy Island while prisoner was there?

Ans. There was one M'Carthy, and John Coronan, who acted as boatmen. M'Carthy belonged to the people on Navy island, and Coronan belonged to the Caroline steamboat—he told me so himself.

Suth. You yesterday stated that you did not know the names of the persons at Navy Island except two—how do you account for this discrepancy?

Ans. I could not bring them to recollection yesterday.

Suth. Who, did these men above named inform witness, furnished those provisions, brought on Navy Island?

Ans. I do not know who furnished these provisions. Those men told me that they took them in at Schlosser.

Suth. Does witness say he came on Navy Island, not with the intention, or for the purpose of joining the forces there at the time, and that he was detained there against his will—and does he mean to testify that he came upon Navy island merely to gratify his curiosity, or did he consider himself a prisoner detained against his will?

Ans. I went there for the purpose of not joining the party. Gen. Sutherland told me not to make myself uneasy as I might stop with him in his quarters. I do mean to say that I was detained there against my will. I do mean to say that I went to Navy Island merely to gratify my curiosity. I did consider myself a prisoner, not being allowed to return in the boat, there being a guard on the beach who had orders from Gen. Sutherland, Mr. Gorham and Mackenzie, to allow no person to leave the Island without they passed them.

Suth. When did witness leave Navy Island, and under what circumstances?

Ans. I left it on the 4th of January, in the absence of Mackenzie, by obtaining leave of General Van Rensselaer, on condition of returning that evening. The General told me to go to Captain Harper, and obtain a pass from him, and bring it to him, the General, which I did and he approved it.

Suth. Did witness hold any rank, or did he exercise any office on Navy Island after prisoner left there: or was he then and there ranked above a private?

Ans. General Sutherland said that I was to act as Adjutant, and I did so through fear; and I continued to act until a friend of Maj. Vreeland came to the island, who was appointed to the office, I being displaced, in consequence of not acting more efficiently.

Suth. Did prisoner ever make any threat to witness on Navy Island—if so, what was it and who was present?

Ans. No.

Suth. Is witness at this time a prisoner in this province, charged with treason, or any other offience against Her Majesty the Queen of Great Britain: if so, has he been promised, or does he expect a reprieve or pardon, or any mitigation of the penalties of his offence, in consideration of his testifying on this trial against prisoner; or has he directly or indirectly received any promise of benefit, or hope

of reward, for so testifying on this trial—or do you expect the same ?

Ans. I am a prisoner, *but do not know on what charge.* I have not been so promised, nor have I been promised any fee or reward for so testifying, nor do I expect any.

Suth. Has witness conversed with any person engaged with or in the trial or prosecution of this suit against prisoner, in relation to what he should testify to on this trial, or in relation to what he knew of the prisoner having been on Navy Island ; if so, with whom was the conversation, and what was the substance thereof—or had you any conversation with any other person besides the Judge Advocate on the subject contained in this question ; if so, state with whom and the particulars of such conversation ?

Ans. Yes. I had a conversation with the Judge Advocate ; he said that Gen. Sutherland was a prisoner and asked if I knew him. I said I did know him to have been on Navy Island part of the time I was there. He asked me if I was satisfied to give evidence against him, and I said I was. Nothing else passed as I recollect. I had no conversation with any one else on the subject.

Suth. Was it customary or usual while prisoner was on Navy Island, to detain all persons who came there, and were those prevented from leaving without the consent of Gen. Van Rensselaer ?

Ans. Not in all cases. Those who were on the island were prevented from leaving it without leave of Gen. Van Rensselaer, and Sutherland, Mr. Mackenzie, Gorham and others.

Suth. Were other persons than witness who came on Navy Island from motives of curiosity, as they alleged, detained there while witness was on Navy Island—and were any of those persons so detained, appointed to offices—if so, was such a course usual ?

Ans. Yes, there was one of them appointed to office, and he is the only one I know of. The person so appointed I think was named Rogers. I know that he wanted to go back several times, but was prevented and threatened to be confined as a prisoner if he attempted to get away from the Island.

Suth. Was Rogers on the island when prisoner was there, and what office did he hold, and what countryman was he ?

Ans. He was. He was told that he was to act in capacity of Sergeant, and he did act as Sergeant, and he was compelled to do so. He belonged to Canada, the man told me he was from near Chippewa in Upper Canada. I have to add, that I have no knowledge myself of what county he was a native.

Suth. You stated that you were afraid to leave Navy Island, what reason had you to be afraid.

Ans. The orders on the Island were that any person leaving the

island without leave was to be fired on, if they did not return when ordered.

Suth. Has not witness heard prisoner say, while he was on Navy Island, that he, the prisoner, had nothing to do with Mackenzie, and that he would have nothing to do with him?

Ans. I never heard him say so.

Suth. Did you ever apply to prisoner for leave to go from Navy Island?

Ans. I do not recollect that I did.

Suth. Did Mr. W. L. Mackenzie exercise any military command while prisoner was on Navy Island, or assume to direct or command any persons who acted there as soldiers, to the knowledge of prisoner, while prisoner was there?

Ans. Nothing further than preventing people from leaving the island. I recollect on one occasion that Mr. Mackenzie exercised this authority when prisoner was present. I think the prisoner must have been close enough to hear, for I was one of those who wished then to leave the island.

Suth. Does witness know from what country and from what place the muskets, swords, rifles, cannon and other munitions of war, which he saw on Navy Island, or any part of them, were brought from, or by whom they were brought there; if so, state?

Ans. I saw a company come to the island, about 40 or more, of Americans and Canadians, who were armed with muskets, rifles, swords and pistols. I think those came from Schlosser on the American shore to the island.

Court. Are you aware that there was a provisional government established on the island, and if so, who were the members of that government?

Ans. There was a proclamation on the island establishing a provisional government, and Mackenzie was chairman of it, pro tem. There were more names signed, but I do not recollect them. I think that Nelson Gorham and Silas Fletcher were of the number.

Court. Were the military forces over which prisoner was seen in command, acting under the orders of that government?

Ans. Yes.

Suth. What can witness offer of that fact, that the military on the island were acting under the orders of a provisional government while prisoner was there?

Ans. I was told by Mackenzie that he was the person who was the author of the proclamation published and placed upon the Island in different places.

Suth. You say there was a provisional government, define the powers of that provisional government, and by whom granted, and

by whom exercised—and what acts can you mention. Was the handbill you speak of, circulated whilst prisoner was there, on Navy Island, and what were the offices of the government and who filled them ?

Ans. I know that they invaded a part of the province of Upper Canada, and held it against the authorities of the British government, and had a flag flying with the word liberty on it, and two stars : this power was granted by Mackenzie and others on the island. Of their acts, I mention that I knew them to fire on the inhabitants of Canada from the island. The handbill or proclamation was circulated while the prisoner was there. Mr. Mackenzie was chairman of the committee who framed the proclamation, but I cannot name the other officers.

Suth. Does the witness know by whom the flag he speaks of, was put on Navy Island ?

Ans. I do not know, but it was flying on the island when I came there.

Suth. Does witness know by whose permission, or by what authority, Gen. Van Rensselaer, prisoner, or any other citizen of the United States was on Navy Island ? if so, state it. Can witness say they were or were not on Navy Island, by the order or permission of the Government of the state of New-York, or of the United States, or of Her Britannic Majesty ?

Ans. They assumed the authority themselves of their own accord. I do not know that they had any from the state of New-York or the United States, nor have I any reason to think they had. I know they had no authority from her Britannic Majesty.

Suth. Has witness on his direct examination stated all that was materia that prisoner said to the men on Navy Island, as he was about to leave the island.

Ans. I do not recollect any more of importance.

Suth. Was John S. Vreeland a citizen of the United States to to your knowledge ?

Ans. I have heard it said that he was, but I am not sure. I should think that he was a citizen of the United States.

Suth. Witness says he saw Mr. W. L. Mackenzie on Navy Island, did he ever see Mackenzie wear any kind of arms, at the time he says he saw prisoner on the island ?

Ans. I saw him carry pistols in his breast during that time.

Suth. Witness, at the first conversation you held with prisoner on Navy Island, did you or not tell him Mr. W. L. Mackenzie was your particular friend, or friend, and that you had come to Navy Island to see him, and that he had persuaded you to stay on the island ?

Ans. I did not tell him so. I do not recollect any thing of the kind.

Suth. Witness, what has been your occupation for the past year?

Ans. I was on Lake Ontario in a schooner, part of that time in the summer months. After leaving the schooner I lived in Toronto, until the 31st of October last.

Suth. Witness, were you an inhabitant of the state of New-York for some months previous to your going upon Navy Island; if so, state how many months, and where you resided in said state?

Ans. I was in Rochester part of the time, and in Buffalo part of the time, trading, but I was not a resident inhabitant of that state.

Suth. Witness, have you before testified or been examined concerning your having been on Navy Island, and about what transpired there; did you then testify or state concerning the same matters now testified to, as you before testified?

Ans. I came of my own accord to Waterloo opposite Black Rock, and was asked there by Colonel Kirby what my business was. I stated that I came from Navy Island, and shewed my pass from thence. I told him all I knew of Navy Island. I was then sent to Chippewa where I saw Col. MacNab, in the evening, with some other officers, and I stated to him the same I did to Col. Kirby, as nearly as I could recollect. Col. MacNab then desired me to call on him again the next morning. I called on him the next day which was the fourteenth or fifteenth of January, and a magistrate was sent for, before whom I made a statement like what I made the day before, and partly the same as I have made before this Court, the same in substance.

Suth. Did you tell prisoner on Navy Island that Mr. W. L. Mackenzie had assisted you in getting some office in Toronto—and that he had done you other favors?

Ans. No. I did not.

Suth. Where were you, witness, and what were you engaged about from the fourth of January, when you say you obtained your pass on the island, and the thirteenth, when you say you crossed to Waterloo?

Ans. After I left the island, I discovered that I left a coat of mine behind upon it—and waited two or three days at Schlosser to recover it. I afterwards went to Buffalo and crossed at Waterloo on Saturday the thirteenth of January.

The Judge Advocate then acquainted the Court that he closed the prosecution here.

The prisoner being called upon for his defence, prayed of the Court to grant him until Thursday next. the twenty-ninth instant,

to send for his witnessess and to prepare his defence. And the Court granted the same accordingly.

The Court was then adjourned by the President, until Thursday next, the twenty-ninth instant, at ten o'clock, A. M.

DEFENCE

OF

GENERAL TH. J. SUTHERLAND.

MR. PRESIDENT AND GENTLEMEN,

Having been arraigned before you, who are represented to me as a Militia General Court Martial of the Province of Upper Canada, on a "charge" prefered against me *as a citizen of the United States of America*, I now enter upon my defence. A copy of the "charge" delivered me by you is in these words, to wit. "That Thomas Jefferson Sutherland, being a citizen of the United States of America, (the said United States of America, being at Peace with the United Kingdom of Great Britain and Ireland,) and having joined himself, on or about the 26th day of December last, at Navy Island, in the District of Niagara, in the Province of Upper Canada to William Lyon McKenzie, and others, unknown subjects of our Sovereign Lady the Queen, who were then and there traitorously in arms against Her Majesty after the twelfth day of January last, within the limits of the province, aforesaid, was in arms against Her Majesty, against the form of the statute in such case made and provided." "A true copy" signed "James Fitz Gibbon, Judge Advocate."

A paper purporting to be a copy of the Law under which you inform me I am here arraigned has also been put into my hands by you. It is entitled "An Act to protect the inhabitants of the Province against lawless aggressions from the subjects of foreign countries at Peace with Her Majesty." The first section of this "act" under which I am now put upon trial, is in the words following—to wit—"Whereas a number of persons lately inhabiting the State of New-York, or some one of the other United States of America, have

within the said State of New-York lately enlisted or engaged themselves to serve as soldiers, or have procured others to enlist or engage themselves to serve as soldiers—and have within the said state of New-York, collected artillery, arms and ammunition, and made other preparations for a hostile invasion of this Province, under the pretext of assisting certain traitors who have fled from this Province to the said United States. And whereas the said persons, without the authority of their Government, and in defiance of its express injunctions, have actually invaded this Province, contrary to the faith and obligation of the treaties subsisting between the United Kingdom of Great Britain and Ireland and the said United States, and during the continuance of the relations of amity and peace between the two countries: And whereas, it is necessary for protecting the peace and security of this Province, to provide for the prompt punishment of persons so offending: Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislature, Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an "Act" passed in the Parliament of Great Britain, entitled "an Act to repeal certain parts of an "Act passed in the fourteenth year of His Majesty's reign, entitled "an Act for making more effectual provisions for the Government of the Province of Quebeck in North America; and to make further provisions for the Government of the said Province," and by the authority of the same—That if any person being a citizen or subject of any foreign state or country at peace with the United Kingdom of Great Britain and Ireland, having joined himself before or after the passing of this Act, to any subject of our sovereign Lady the Queen, Her Heirs or successors, who are, or hereafter may be traitorously in arms against Her Majesty, Her Heirs or Successors, shall after the passing of this Act, be or continue in arms against Her Majesty, Her Heirs or Successors, within this Province, or commit any act of hostility therein —then it shall and may be lawful for the Governor of this Province to order the assembling of a Militia General Court Martial for the trial of such person agreeably to the Militia laws of this Province, and upon being found guilty by such Court Martial of offending against this Act, such person shall be sentenced by said court to suffer death, or such other punishment as shall be awarded by the court."

This act is a novel one—its penalties severe extending even to death! That I should resist on every ground the application of its provisions and penalties to me, is due to myself—and will, I trust be allowed by this court, who will not ascribe the course I am about to take in my defence, to any desire of making captious or frivolous

objections to weary your patience, but to the firm conviction which I entertain, and now declare to you, that neither by the law of this land, nor by the law of nations, can my life or liberty be jeopardized by the course of proceedings instituted against me here.

When I was brought before you on the 19th instant, several preliminary objections were taken by me to your proceedings, all of which were overruled, and only two, (contrary to the usual and established practice of Courts Martial,) were even permitted to be entered by the Judge Advocate in the minutes of your proceedings. You will therefore, now allow me again to call your attention to those objections as well as to some others, which I was prevented from stating formally, by the court on a suggestion from the Judge Advocate that they were untimely, and might be properly urged when I entered on my defence.

After having objected to the formation of the court, and the constitutionality of the act under which, I was told, it was formed, I presented to your consideration the following objections, as you will recollect.

1. That one half of the members constituting the Court had never been on a previous Court Martial.
2. That the President of the court had not so previously sat.
3. That one of the members of the court, Major Dewson, was, at the time, an officer in the regular army of Her Majesty, under full pay, and therefore not eligible.

As to the first of these objections I would remark that the Militia laws of this Province are silent on the subject—but in the absence of statutary provisions on that head, the usual course, which is in support of the objections made, in my opinion, ought to be required.—The practice of Courts Martial, the articles of war, and the meeting act, are and ought to be the guide in the absence of any particular Statutary enactment, and such has been recognized by this court in its order of arrangement, mode of taking votes on all questions, in preventing counsel addressing the Court, and doubtless intended to be pursued in the conducting of the cause, although on this latter head, there have been points of departure, materially affecting me in this case, which I shall, at the proper time, endeavour to show.

When the second objection was raised, which was to the President of this Court, it was not intended as captious, it was made under the full impression that he had never acted on a previous court of kind, and therefore not the best qualified for the discharge of so important and responsible a situation; my objection was overruled, and so it was in the case of Gen. Belford, on Lord George Sackville's trial—and he, as it is observed in Adye on Courts Martial,

folio 117 with great propriety declined sitting as a member.* The third of these objections, the only one entered on your minutes by the Judge Advocate was over-ruled as well as the two preceeding.

By the only provincial law as I conceive applicable to this case (48, Gec. 3d C. 1—Sec. 23) it is provided "That no officer serving in any of His Majesty's other forces shall sit in any Court Martial," &c. and the same section adds, "upon the trial of any officer or private man serving in the Militia," Evidently proving that no others than subjects were deemed amenable to such a court.

If there were any doubts that others, than subjects, were meant to be made thus liable to such a court, the first clause of said section would remove it, for constituting the court, it provides that "The Governor &c. upon complaint and application to him made, through the Colonel or officer commanding the body of Militia to which the party accused may belong, shall issue his order to the said commanding officer to assemble a General Court Martial," &c.

After having been over-ruled by you in all my objections, I proceeded to urge several pleas in Bar (which I was sustained in, by acknowledged authorities. See Tytler page 243) to the further prosecution of this trial, which pleas the Court then refused to receive at the same time informing me that, if the pleas were available, they might be urged on my defence, as well as any further objections I chose to raise to these proceedings. I therefore pleaded "not Guilty" to the charge.

The Court will then allow me in as brief a manner as possible, to bring forward such other and further pleas and objections as I may have to urge, the substance of some of which I may remark, I had suggested to you before my plea of "not Guilty" was recorded.

I now respectfully urge and insist that this court composed as it is of only *nine members*, does not consist of the member of officers required by the laws of this Province under which its Constitution can alone be recognized.

The first part of Sec. 23. C. 1—48 Geo. iii, declares "that the Court Martial shall consist of a President who shall be a field officer, and twelve other commissioned officers of the Militia."

It is conceded that by an act of this Province passed in the first year of Her present Majesty's reign, it is provided by the 32d Sec.

* By the common law of England, though jurors may be challenged, the judges or justices cannot; but in the courts where the proceedings are carried on, according to the civil and canon laws, the judges, who, like the members of courts martial, are also judges of facts, may be challenged. And they commonly, of their own accord, decline sitting as judges in a cause where they may be supposed to be under the least bias or partiality to one side or the other.—1 Coke's Inst. fol. 294--677.

thereof, "that the Court Martial shall consist of a President who shall be a field officer, and not less than eight other commissioned officers of the Militia." But this law was not in existence when this highly penal, and as I conceive unconstitutional "Act" under which I am here being tried was passed. This "Act" now described and known as the "Militia Law of this Province" only became a law on the sixth day of March last, past two days after I became a prisoner. To try me under this law, for an alledged offience, charged to have been committed, long before the passage of the law, would be, as I conceive, giving it a retrospective effect, for which no precedent can be found in British Legislation, or British Jurisprudence, and directly in contravention of the provisions and intentions of the constituted charter of the liberties of the People—and to me most injust. It is enacted by 33 Geo. iii, C. 13, That the Clerk of Parliament shall indorse on every Act the time it receives the Royal assent, which endorsement shall be taken to be a part of the Act—and to be the date of its commencement where no other is provided, Cited 6 Bac. 371.

It is in the general true, that no statute is to have a retrospect beyond the time of its commencement; for the rule and law of Parliament is that, "nova constitutis futuris foronam defet emponeu non practerites"—a new law ought to place its mandate (ought to be inforced) for the future—to meet future contingencies or events—not those that are pas' Sec. 2—Mod. R. 310, Gilmore vs. the Exr. of Shorter.

This case arose upon a promise made before the 24th of June 1677, an action was brought against the Executors—and the question was whether the promise, it not being in writing, was within 29th, C. ii, C. iii, whereby it is enacted that from and after the 24th of June 1677, no action shall be brought &c., (in certain cases therein mentioned,) unless in writing signed. The court said it cannot be presented that the statute was to have a retrospect, so as to take away a right of action which the Plff. was entitled to, before the time of its commencement, cited in Bac. 6, Vol. 370.

So in my case, on the 4th of March I was captured, and am now undergoing trial upon a charge under the Statute of the 12th of January preceding. I was then entitled to a court of *thirteen members*, corresponding to the twelve Jurors of the civil law, instead of this court consisting of but *nine members*, organized under a law not in existence when the offence is alleged to have been committed, but passed subsequent thereto—namely, on the sixth of March, two days after my capture.

I also, now respectfully urge and insist that the "charge prefered against me, and on which I am now being tried, is insufficient and

defective, and not in accordance with the letter, spirit, or meaning of the "Act" under which, you informed me, I am now arraigned.

The first section of the "Act" of your Provincial Legislature, passed 12th January, A. D. 1838, against the provisions of which I have already recited—declares in substance "that if any person being a citizen or subject of any foreign state or country who may have at any time joined himself to any of the subjects of Her Majesty the Queen of Great Britain, &c. which subjects were on the 12th day of January 1838, or at any time thereafter, (with such foreigners) traitorously in arms against Her Majesty, shall, after the said 12th day of January 1838, be, or continue in arms against Her Majesty, within the Province of Upper Canada—or commit any act of hostility therein, after the said 12th day of January 1838, then it shall and may be lawful for the Governor of this Province to order the assembling of a Militia General Court Martial for the trial of such persons agreeably to the Militia Laws of this Province" &c. Now it will be observed by the express terms of the provisions of this Act—the person who is charged with having offended against the provisions of this act, is to be tried by the then existing Militia Laws of this Province—and the charge is defective in as much as it is not alleged therein, that on or after the 12th day of January 1838, (the passage of the act,) I was in arms with any of the subjects of Her Majesty within this province, "or committed any act of hostility therein" as required by the provisions of the "act" under which this charge professes to have been framed. To subject me to the penalties of this highly penal statute which must be rigidly construed —as it is provided "that all penal statutes must be strictly construed," (see 14th Geo. ii, C. 6, cited in Blackstones Com. 1 vol. 88, in confirmation of this rule of Law,) it should have been specified "that after the 12th day of January last I was in arms with such traitorous subjects in this Province" &c., which is not done. I also respectfully object that the "charge" is not sufficiently specific in as much as it omits time or place, which are material omissions, see folio 214 and 215 Tytler on Martial Law.

The first section of the "act" passed 12th January, now under consideration, was intended to punish (if the Legislature of this Province had a right to pass such a law) certain foreigners who after the passing of that act, were in arms within this Province with traitorous subjects of Her Majesty. The preamble of this act proves what foreigners were meant and intended by the "act," as foreigners from the State of New-York invading this Province from the State of New-York—not intending to provide for such as might invade from Alabama or Kentucky. Invasion from New-York only was in contemplation at the passing of the "act," it is notorious

that there was no hostile assemblage of men from one extreme of Upper Canada to the other—except at Navy Island, a point conterminous upon the State of New-York, (a party at Bois Blanc having been previously dispersed) in that direction, (Navy Island) was the mischief, and to meet it was the object of this act ; now, when I was arrested I was peaceably and quietly crossing from Michigan to the State of Ohio—not coming from the State of New-York to Upper Canada, as the law contemplated –the cause which moved the Legislature to enact a law, is always to be taken into consideration—(see Black. Com. 1, vol. 61,) and I refer to the same authority when I deny that the statute intended to provide for any other case, than one, where the foreigners were in arms in hostile array joined to and combined with others, being traitorous subjects of Her Majesty, as citizens of the United States, who owe no allegiance to the Government of Great Britain or obedience to her laws, could not be of themselves disconnected with Her Majesty's Subjects, traitorously in arms against Her Majesty, as expressed by the act ; and I challenge any ordinance to shew such a case as will bring me within the spirit or meaning of the law. I have already before urged that I am not within its letter. If these objections therefore, must be conceded to be good, then the whole prosecution thereby falls to the ground.

I come now to the consideration of an objection to those proceedings against me, of the greatest magnitude—involving questions of the deepest concern, not merely to the subjects of Her Majesty—but affecting the rights, liberties, and lives, of citizens of free and independent states.

That this "act" of the provincial Parliament of this Province of of the 12th of January, is unconstitutional, and not authorised or founded on any delegated authority of the parent state to constitute it a law, I do most respectfully protest, urge and insist ; and if I occupy some length of time in the consideration of this plea, I trust its importance to me, as well as others similarly situated, will be a sufficient apology. Allow me to ask can it be otherwise conceded, that an "act or law affecting the rights of foreigners can only emanate from the parent state ; if even from such sovereign state it may, I contend that a case like mine with all the charges intended to have alleged, fully and sufficiently proved, which however I do most positively deny having been so done—is only for negotiation between Great Britain and the United States of America, of which I am recognised to be a citizen.

If the province of Upper Canada has a right to enact or create such a law as this "act" of the 12th of January, under which you now profess to try me—so has all or any of Her Majesty's forty colonies equal privileges ; the exercise of such privileges it is however

self evident, would involve the parent state in inextricable difficulties —clashing with its treaties with foreign states—and in a variety of other ways interfering with that power and sovereignty, which it can alone possess. Upon examination it appears to me that the constitutional act of this colony, 31, Geo. III, has clearly defined the powers given to the provincial legislature, and limited its control to certain matters of self government, such laws not being in contravention to the provisions of that act, and not repugnant to the laws of the Empire State. Its treaties are parts and portions of such laws, and can only be made by the superior power, see Vattel 192 ; by the treaty ratified 24th June, 1795, commonly called Jay's treaty, 3d articles provides "that it shall at all times be free to His Majesty's subjects, and to the citizens of the United States dwelling on either side of the boundary line, freely to pass and repass by land or inland navigation into the respective territories and countries of the two parties on the continent of America—and to navigate all the lakes, rivers, and waters thereof," &c. Then, will it be urged that a right derived from such a source can be abrogated—however expedient it might be—by a less authority than the one which had created it ? In the most common dealings of mankind an answer will be found.—The King as supreme head of the Empire, has the prerogative of making war and treaties—leagues and alliances with foreign states, and the colonists are as fully bound by, and subject to the consequences thereof, as the inhabitants within the realm ; see B. Edwards, vol. 2, page 353, cited in Clark's colonial law, fol. 47. It is a restriction imposed by the Governor's commission and instructions, that the laws made in the colony shall not be repugnant to the laws of England. This restriction is enforced by statute 3 and 4, Wm. IV. c. 59, sec. 56, and has regard to the laws of all the colonies of Great Britain, whatever. The only exception to this rule is in the case of Lower Canada, established by 1st Wm. IV. c. 20, cited in Clark's colonial law, page 27. Upon referring to the 46th section of the 31st, Geo. III. it seems evident, that no such powers as have been assumed by the legislature of this province, in passing the "act" under consideration, could have been intended to have been delegated by the mother country.

It was contemplated that the provincial legislature might be disposed to pass laws affecting the empire at large in its commerce, therefore that power was withheld by the above section, then must it not be inferred fairly and clearly, that if "for the general benefit of the empire, the power of regulating its commerce should continue to be exercised by Her Majesty and the parliament of Great Britain," that the solemn obligation of treaties should not be touched or interfered with by so subordinate a power as the legislature of this province.

To prevent the possibility of this colony having the means of involving or jeopardising the interests of the supreme state by the 31st section of the same act, it is declared that whenever any bill, &c. shall have been assented to in His Majesty's name by the Governor, &c. it shall be lawful for His Majesty, within two years after such bill shall have been received by one of the principal secretaries of state, to declare his disallowance of such bill. Then can it be conceived for a moment that a Provincial Bill affecting the lives of foreigners, and in defiance of solemn treaties, would be allowed to become a law. In fact it may be at this very time disallowed, yet if this court should pass sentence against me under it, and I suffer its penalties, where is my redress ?

In addition to the objections already taken, I would further respectfully urge and insist, that neither the militia act of Geo. III. c. 48, or the "act" passed the 6th of March, have or had in contemplation the trial of any others than militia men or officers of the militia of this province. The oath required in each of these "acts" to be administered by the Judge Advocate, and which was administered by the Judge Advocate to each member of this Court Martial, is in the following words : "You A. B. do swear that you will administer justice to the best of your understanding in the matter now before you, according to the evidence and the militia laws now in force in this province, without partiality, favor or affection," &c. What sections of either of those militia laws, have I infringed or became liable to trial under—can the act (passed Jan. 12, 1838,) under which I am now being tried, be called a militia law ? I read at the head of the paper, purporting to be a copy, furnished me—that it is "An act to protect the inhabitants of this province against lawless aggressions from the subjects of foreign countries at peace with Her Majesty." The title given it, without looking into the body of the "act" proves the contrary ; then can the oath you have taken be at all binding ? Not in the least, for justice in Courts—as it has been remarked by Chan. Eldon, a very learned and able English jurist, is not the mere sec vole of a Judge or tribunal, but right, measured by the law, and you have no such law as mentioned in the oath you have taken, by which to judge me or my acts.

A public statute requires no proof, Starkie's evidence, 1 vol. 163. It is defined to be one, when it affects all the kings subjects. Am I not a foreigner—and as this act we are considering affects me, and not Her Majesty's subjects, must it not be looked upon as a private act ? It is not declared a "public act" even if such declaration could make it one. Then to have commenced the proof in this matter legally, a properly authenticated copy (upon oath) of said act of he 12th of Jan., should have been produced to this court as

the first step. But this has not been done, and what evidence have I a foreigner, that any such law has been made in this province, and continues in full force.

"A private act is defined to be such as operates upon particular persons," and therefore should be proved.

Again, there are many presumptions in law, some obviously very violent. Among others, the presumption that every one being a citizen or subject knows the law, however ignorant, however remote his residence from the law making place, notwithstanding the individual being a subject of the country, never gave a vote for any representative who may have assisted in making the law—indeed, from his poverty, or other reason, had no vote to give—yet it is presumed he knows the law, it is presumed that either directly or indirectly, he gave his sanction or aid to its formation. He belongs to the country, he must be governed by its laws. Can the presumption, however violent in the above case and apparently unjust, can it, I urge, be extended to the citizen of a foreign country, does he aid directly or indirectly, or can it be presumed that he who owes no allegiance to the government or laws, aided in the formation of the acts of a strange country? The answer is clear that he cannot, therefore the act which affects "particular individuals" being foreigners, who had no part in framing it, must be considered a "private act," and must be proved in the usual manner, by the production of a properly authenticated copy.

This course not having been observed with respect to the act said to have been passed 12th of January last, under which I am tried, is a further ground of protest to the legality of the proceedings had before this Court Martial. I cite 3d Campbell 166, Cowper 174, 2d Earl 261, 3d Earl 381, all cited in Clark's colonial law, folio 101,

I will here raise another objection, that the plans produced purporting to shew the line of demarcation between Canada and the United States were not proven to have been the original plans, settled and confirmed by the commissioners under the treaty of Ghent, or even copies of such plans duly authenticated, and therefore that they are inadmissible evidence on this trial; see testimony of Hon. J. Macaully in minutes of proceedings of this Court.

I might have been within a mile and a half of the Canada shore when captured, and yet, for aught that appears as legal evidence before this court, within the territories of the United States. The best evidence that the nature of the case admits of, or even secondary evidence on this important fact has not been produced.

I now except to and respectfully protest against the course adopted by this Court under the suggestion of the Judge Advocate. When the witness Mr. Macaully, Surveyor General, was called on the

part of the prosecution, and sundry maps were exhibited professing to shew the boundary line between this Province and the United States, and after all the evidence he could give on the part of the prosecution had closed, I was desirous to shew by a cross examination of this witness, many points important to my defence; among others, that the dividing line marked on the maps produced was incorrect and erroneous—and that witness knew little or nothing of the American shore, and therefore could not pretend to say where the dividing line actually was between the two countries at the place of enquiry. As a cross examination, I had a right to enter into as laid down in Tytler 245, in McArthur, 2 vol. page 40, in Starkie on evidence, page 98 and 129, 1 vol. and in many other authorities I might quote. Your President refused me this right, which I now allege to be error in these proceedings, affecting the merits of the cause.

I am also bound to except to, and enter my protest against the proceedings of this Court Martial on another point. A paper purporting to have contained the substance of an admission or examination said to have been taken before Colonel Prince and others, magistrates of the Western District of this province, was produced and read; and when the Judge Advocate had closed his examination of Mr. Prince, I was desirous to cross examine him, as to the admissions made on that occasion, and to obtain the whole of those admissions. I was then stopped by the President, and denied this right contrary to a general rule cited in 1 Starkie 372, where it is declared that the whole of the contemporaneous statement or declaration must be received—the part which operates for him, as well as that which makes against him. 2 Bac. Abr. fol. 664, to the same effect.

I would further respectfully except and protest, that the paper produced purporting to be my examination or admission, ought not to have been read, because I had not signed it, nor was there any evidence that I was called upon to sign it, and had objected or refused. See 2d Bac. 664, as authority on this point.

The only motive an accused person can have for making a confession of any fact or circumstance which should militate against him, is a consciousness that the whole truth of the facts and circumstances connected with the charges against him, would be better received by honorable men, than a denial of such facts and circumstances as may be reasonably supposed to exist, while he admits that which goes to his excuse. Hence the rule whenever any part of a prisoner's confession be given in evidence against him, the whole must be taken without enquiring whether every part of such confession be relevant or not, otherwise than that it is a part of the priso-

mere confession. To vary this salutary rule would be a fraud upon the right of the accused.

I have now stated the pleas and objections I have to urge in bar of these proceedings against me, which you have ever conceeded I had a right to do, in this my defence, and I beg you will allow me also to remark, that I now most earnestly believe I have raised objections too substantial, and reasons too weighty, for you to sustain these proceedings for one moment under the color of the law of this Province, and as what ever shall be done by you, or urged by me, on this occasion, will not like the events of the *last assize* be forgotten with the terms of the receeding year. I feel that while I am tremblingly aware of the situation in which I am placed, still as a man and a freeman, it becomes me to urge these objections boldly and firmly.

I come now to consider the testimony of John Prince and Prideaux Girty, Esqrs. and that part of the "charge" against me, which says "that within the limits of this province. I was in arms against her Majesty, against the form of said statute." Col. Prince and Capt. Girty, both testified that on the 4th of March inst. they were travelling on the shores of Lake Erie from Gosfield to Amherstburgh, when they discovered, in the words of Col. Prince "*at a great distance two objects on the ice.*" Captain Girty testifies that after driving one mile towards Amherstburgh, they discovered the two objects to be men. Col. Prince testifies he discovered the two objects which they had seen at so great a distance on the ice to be men, in twenty minutes from the moment they first discovered them—and both, conceiving them to be spies, Col. Prince with two fresh horses and sleighs, with a Mr. Haggerty went in pursuit. He, Col. Prince, testifies he prevailed on Capt. Girty to remain where he was, because he was unwell and his horses tired. Capt. Girty testifies that "he for a few moments halted at the place with his sleigh, and as he thought he discovered the persons running, he drove after them." This is remarkable as Col. Prince had by the testimony of both—drove off rapidly with two fresh sleighs and horses, and Capt. Girty had remained because his team was tired, and Col. Prince who was nearest and first came up with me and my companion, makes no charge that we ran one step.

Col. Prince testified that he came within one hundred yards of myself and Mr. Spencer—then desired us to halt, that we did so, and that I said to him, "*what do you want, we are American Citizens going about our own business, on our own soil?*" as he further testifies of his own accord, that I at the moment "charged him with having captured myself and companion on the American waters.."

Col. Prince here also testified that when within one hundred yards of us he left his sleigh and divested himself of his *pistols* and a *tomahawk* which he carried, and pursued us alone with his gun, and that not until after having done so did he recognize who I was—that then having discovered that my companion and myself had swords, he took mine from me, and desired Mr. Haggerty who he says was with him to divest my companion of his sword, and both of which he says were taken without opposition, and then after having told us that "we were the very sort of persons he was looking for" as he has testified—he demanded of us "if we had any fire arms about us"—that "we assured him we had not, and that he told us that he would be satisfied with that assurance, and would not search us!!"

Now, how can the conduct of Col. Prince be accounted for in permitting myself and companion to pass without being searched for fire arms, when from aught he knew, except from our own words, we were doubly armed with dirk and pistols under our cloaks ready to destoy him and his companions at the first unguarded moment. Did he conceive my word good security for the safety of his life at such a time when no prowess would be proof against pistol or dirk and disbelieve me, when I told him we were American citizens on American ground?

While I do most solemnly deny the "charge" of having been in arms within this Province against Her Majesty, either joined with or without any of her Majesty's subjects who have been traitorously in arms against Her Majesty since the 12th day of January 1838, it may not be improper for me here to state, that having been for a short time connected with some persons who were exerting themselves to give countenance and to sustain a revolutionary party in this Province, before the 12th day of January—on or about the 5th day of February last I resolved to have nothing more to do with the said persons who are known by the name of Patriots on the frontier of the United States. At this time I was in the city of Detroit and made my resignation or dissolution from the Patriots known, as well as a determination which I had entertained to compile and publish a book in which I proposed to give an account of what had transpired on the frontier of the United States and Upper Canada, since the first day of December last, and for which work I had already spent some time in procuring necessary information and documents, and had made my arrangements to proceed east from Detroit for that purpose. Having procured a private conveyance from Detroit to Toledo, Ohio, I put the principal part of my baggage into the carriage in which I was to proceed: after having done so I was unexpectedly detained and the person who was to convey me to Toledo went off with my baggage from Detroit. In a short time I followed, ex-

pecting to find my baggage at Toledo. But when I arrived there to my surprise I found the person who had brought it from Detroit had left it at Monroe, a place between Detroit and Toledo; on learning this I returned to Monroe in pursuit of my baggage, which contained all my clothes, securities, private papers, and other valuable effects, amounting in value to me, to a somewhat important amount, and including about all my available property, and on my arrival at Monroe which I think was on Friday the 23d of February, I learned to my still greater surprise and chagrin that I had been robbed of all my baggage and effects which had been brought from Detroit and left at that place. In tracing the circumstances connected with the robbery of my baggage, I possessed myself of testimony sufficient to fix the crime on four individuals, who had been concerned in taking my property, and took out process for two of the persons whom I learned had gone to Detroit and proceeded there in pursuit. When I arrived at Detroit I succeeded in recovering a few articles of my clothing (which I had with me when I was captured by Col. Prince.) While I was at Detroit the two individuals who had got possession of the greater part of my property fled from the city east towards Buffalo, on the route through Ohio. Having learned my misfortune, Mr. Spencer, who was captured with me and who had given me notice of some of the facts above stated, kindly volunteered his services to assist me in recovering my property, and having learned that the individuals who had fled with my property (the principal of whom was one Charles G. Irish, Jr. of the city of Buffalo, and for whom I had taken out a process before one Morton, a justice of the peace at Monroe, and which said process is now in the hands of a police officer in the city of Detroit) had taken the route to the east in a wagon by the way of Perrysburg and Lower Sandusky in Ohio, to which last mentioned place by the route spoken of from Detroit, the distance is estimated at 130 miles, while in a direct line across the head waters of Lake Erie, from Detroit to Lower Sandusky it could be no more than 70 miles, and perhaps less. In company with Mr. Spencer I had readily procured a conveyance to Gibralter. When I arrived there Mr. Spencer advised me to proceed from that place across the ice on foot to Lower Sandusky as the most certain manner of taking the person who had my property, as he informed me he had been across on the ice, and was well acquainted with the route, and that by taking the ice on foot, we could not fail to arrive at Lower Sandusky sooner than it would be possible for the persons for whom we were in pursuit, and thereby intercept them in their flight. Believing such a course the most likely manner of recovering my property and Mr. Spencer offering to conduct me across the ice, directly as proposed, to Lower

Sandusky, I accordingly consented to the course by him proposed and left Gibralter with him at about 12 o'clock M. on the 4th of March last, and passed down the head of the lake, on the American side of the channel, until we were captured by Col. Prince at about half past 4 P. M. as I think it was. After leaving Gibralter we had travelled at a rapid rate down the Lake on the ice until captured, about four and a half hours after we had left—at which time we must have been from 16 to 18 miles below Gibralter, judging from the manner we travelled.

I was not at the time of my capture connected with any persons, Canadians or others, subjects of Great Britain or any persons, citizens or subjects of any other country, or any other body of men who were engaged with, or in any operations against the Province of Upper Canada, or the people of the said Province, either in Canada or in the United States—and I had no intention of going into any part of the Province of Upper Canada, or nearer to it than was necessary for me to go in passing from Gibralter in Michigan to Lower Sandusky in Ohio—towards which place we were travelling when captured. My *arms* were then and are now to the best of my knowledge at Toledo—and the old swords Mr. Spencer and myself had with us, were in our possession more from the circumstance of having by chance put our hands on them, than from any other motive. It may be argued though no evidence of the kind has been offered here, that I might have been on my way to Pelo island, or endeavoring to reconnoitre the Canada shore. The first is improbable, for with the force on the island I never had connexion, and at the time I left Detroit it was generally known that the Patriot force had been driven off by your troops. What was then the object in proceeding thither? The Canada shore to which I was opposite had nothing to attract me, there being neither a party nor armed bodies of men, or friends to communicate with in that direction: no inducement of that nature has been attempted to be shown.

Was I armed as a person in his senses would be likely to be for such an enterprise, nothing but a sword, slung with my bundle over my shoulder, or worn as Col. Prince has testified, "as military men usually wear them." Where were pistols, rifles or any other offensive weapons? None, only a miserable sword so *paltry* "that a British officer would consider it a disgrace to wear," and of no other use to me than the means of expelling the insinuations attempted to be thrown upon me—that I was in the character of a spy, as without proof of having in my possession any kind of documents, maps, charts, plots, plans, or correspondence, or of my being at the time in connexion with any of Her Majesty's subjects in the Province or on the shores of the United States, or that I had the

most partial acquaintance with any single individual residing within this Province, the wearing of a "military cloak" with even a weapon of so paltry a character in the manner as it is testified "as military men usually do," will be granted I trust by you sufficient evidence that I had none of the objects of a spy in view! When was the act of hostility proved? When the wretched weapon I had was demanded of me, was there any thing like resistance attempted, although I claimed to be on the soil of my country?

Col. Prince and Capt. Girty have both testified that I was captured on the waters of Lake Erie within one and a half miles of the Canada shore, which I shall shew you is but a mere opinion, based upon no fact whatever, and in which they are positively mistaken. Yet admitting for the sake of argument that I was within the Canadian line, which however I firmly deny, and of which I insist there is no legal evidence offered—ought not the intention to be collected from the circumstances to have any weight? If bound to Sandusky (and there is no positive or circumstantial evidence adduced to infer, much less prove the contrary, but on the other hand strongly to sustain my statement,) I had incautiously or ignorantly overstepped this imaginary line (there being no buoys or other evidence of the division) whilst thus endeavoring to make my point of destination. Am I guilty within the intent and meaning of this Act? I would put the case, if a schooner laden with tea or any other contraband article, if imported into this Province, bound from Oswego to Lewiston, in going up the Niagara river, grounded on some shoal on the Canada side (and in attempting to extricate himself, threw out some boxes of the tea or other contraband article, would this be called breaking bulk, and make her liable to condemnation; or if she should be beating up the river with this cargo across the imaginary division line to the Canada side, would her cargo be liable to confiscation? Certainly not. Then if I in a route such as it is between Monroe and Sandusky—taken over the ice to avoid a land circuit of twice the distance—finding impediments on the ice such as existed, in its being thrown up in several places and therefore difficult of crossing—or if I incautiously should happen to stray across this line—and without being in company with *traitorous British subjects* as required by the "Act," without any overt act of hostility being proved in any manner, am I to be subject to the pains and penalties of this Provincial statute under which I am arraigned?

Again, suppose I had been captured at the head of and connected with an armed force of a thousand men, within this Province, wearing no weapon upon my person and but a spy-glass in my hand—could it be denied but that I was in arms, within the meaning of the "Act"? I think not. Then if I had been taken in one of the

streets of Toronto, bearing arms upon my person as a Turk, but disconnected with any armed force or body of men, who should say "I was in arms against Her Majesty, in this Province." You might as well talk of a child's being in array against its parents with a tea spoon! The offence intended to be created under this "Act" by which you now profess to try me, is not the mere wearing of a pocket pistol, or other arms upon the person, but the act of being joined and connected with an armed body of men, competent to resist the authority of the Queen—or at least with the manifest intent of so doing.

On his direct examination Colonel Prince has testified that at the time I was captured by him after I had stated "we were American citizens going about our business," he had replied that Americans had no business there in those times, to which I then said "I was going to Lower Sandusky to endeavor to intercept some persons who had stolen some money from me and my clothes and valise while I was in Monroe." Now any statements made by me at the time of my arrest could not be given in evidence by me on my defence. Such statements could only as they have in this case legally be adduced on the part of the prosecution, and when once so given in evidence such statements are good evidence for me, and prove all the facts the words contain, unless the same be destroyed or discredited by other testimony. Now let me examine what testimony has been adduced to destroy or discredit such of my statements. In continuation Col. Prince testifies, "that at the time I was captured I was one mile this side of the line leading to Sandusky—and that my steps were then directed towards the Canada shore—that a line leading from where I was captured to Sandusky would run in a *south-westerly* course as far as he could judge and that I was going in a course about south-easterly—he thinks—and if I had pursued the course I had been travelling I would have been on the Canada shore in about half an hour! But by referring to the maps which have been here produced, you will find that a line drawn from any point near where Col. Prince has stated I was captured running in a south-westerly direction, would never reach Sandusky or Lower Sandusky.

And you will also find on such examination that if I was travelling in a course about south easterly, as he testified I was when captured. I was going on about a direct line *towards Sandusky* which lies in a southeast direction from where we were and on as direct a route as I could pursue towards Lower Sandusky, and that such a course would never have taken us to the Canada shore.

As to the course we were travelling when captured by him, Col. Prince is correct as to its being a south-east course. In this he had something to guide his judgment. He pursued us in the same di-

rection we were pursuing, and there was the bright sun to tell him the course, but the Canada shore was due north.

In all other respects you will perceive Col. Prince has made "a very chaos of earth" on the shores of the head waters of Lake Erie. Unless his statements are all erroneous, maps and geographies are worse than useless, and all our School Atlases and books need an immediate revision and correction.

In answer to my seventh question proposed to him, Captain Girty says he pursued us in a *southerly direction.* In this he was correct, as the shores of Canada from whence he started was directly north of us, and to guide his judgment, in this respect he too had the sun. For in answer to my 12th question to him, he says it was a tolerably clear or fine afternoon. All the rest are mistakes.

I am to suppose that when Col. Prince says I was one mile this side of a line leading to Sandusky, that he means such a line drawn from some point different from the place where I was captured, for I am a loss to discover how I could be a mile one side or the other of a line drawn from my feet. But suppose the line be drawn at any place within six and a half miles, the width he gives the body of the water on which I was captured, 9 or 10 miles above, extending to another point 40 miles below. I am surprised that he should hazard a statement that I was captured one mile either one way or the other without some better means of judging than were presented to him.

In answer to my 17th question proposed to him, Col. Prince stated that at the time of my capture, he knew of no other island nearer than Bois Blanc, which was seven or eight miles from the Schooner.

Captain Girty, in answer to my 5th question proposed to him, says, that at the time of my capture, the island of Bois Blanc was more than four miles from the Schooner mentioned.

Here then, according to the testimony of both these witnesses at the time of my capture, the island of Bois Blanc and the Schooner mentioned were both plain and palpable to be seen, yet while Col. Prince says Bois Blanc must have been as he thinks 7 or 8 miles from the schooner. Capt. Girty testified that "it was more than four miles from the schooner," i. e. less than five miles, making a variance in their statements of the distance between the two objects of between four and five miles. If they could be thus mistaken (as one or the other must have been by their own statements, and as it is evident both were upon examination of the maps.)

In answer to my 5th question proposed to him, Col. Prince testified that at the time of my capture (about twenty minutes after) I stated to him we had been going to a schooner near for the night, and in answer to my 8th question he testified that "we were *within half*

a mile of the schooner at the time of capture," and also afterwards testified that there was no other schooner within four miles of the place of our capture.

While Capt. Girty testified that he was only "about a quarter of a mile in the rear of Col. Prince" when he came up with us, and so near that he could see him take my sword from me, and in his answer to my 2d question proposed to him, he further testified that this same schooner was two miles from him, or very near it!

Here then, Col. Prince standing on the ice looked at the schooner, says it was *within half a mile*, while Capt. Girty, one fourth of a mile from him, says it was two miles off, making a distance of one and one fourth miles—and more than one half of the distance alledged.

Here then is a disagreement, and an evident mistake on the part of one of these witnesses, perhaps both.

Suppose Mr. Spencer and myself were standing upon the ice at the head of Lake Erie, and believing such to be the fact should state that we were on the American side of the water, when Col. Prince and Capt. Girty should come up and say we were on the Canada side, who then will take the responsibility to decide which are mistaken, without measurement. The same ratio of variation on our side, as exists in the statement of these two witnesses, between themselves in relation to the schooner, would put us on the American side of the channel without question.

In answer to my 18th and 19th questions proposed to him, Col. Prince testified that at the time I was captured by him, the nearest point on the American shore to us, as he thinks, was at or below Gibralter, Michigan, and we think the nearest point of land at the the time on the Canada shore must have been two or three miles below Hartley's Point—and Col. Prince has also taken it upon himself to say that from the place where I was captured to the Canada shore was not more than one mile and a half—while to the American shore it was not less than five miles, making the distance between the two places six and a half miles, when you will see by the maps the distance between any two points near those mentioned would be fifteen miles.

Col. Prince, you will perceive, places us between two very different points from those stated by Capt. Girty, one or the other must be mistaken! and if there is any truth in the maps we have examined, both are most egregiously so! For they have brought within six or six and a half miles of each other, points of land, which have been, since this earth began regularly to turn upon its axis, more than two or three times that distance apart.

Captain Girty in answer to a question from the court, testifies that

he is well acquainted with the coast along from Amherstburgh to Point Pelle, and in particular that part called Bar Point, and also Hartley's Point, which is the nearest point on the Canada shore to where he says I was taken, and that Point Mouille was the nearest point on the American shore, and "that to the best of his belief, and to be within limits he stated the distance from where I was taken to Point Mouille at four and a half miles, and that the distance to the Canada shore, was within a mile and a half" making the distance between those two points but six miles, although he at the same time, says it is usually called eight miles from shore to shore and on his direct examination he said the distance has been called ten miles between these two points though he calls it but eight miles, and now by referring to the map, you will find it is not less than eighteen miles from Bar, or Harkey's Point to Point Mouille. How possible it is to mistake distance upon the water, when we have nothing to measure with but the eye!

In answer to my fourteenth question proposed to Col. Prince, he testifies that when he first discovered myself and companion on the ice, he was, as far as he could judge, nine miles below Amherstburgh, which he had also testified on his examination was the point of land on the Canada shore opposite which we were captured. We will now, for a proposition, suppose this statement to be correct (although Capt. Girty in this respect by no means corroborates Col. Prince,) and take it side by side with the Colonel's answer to my 17th question proposed to him, in which he says that he knew of no other island nearer the schooner mentioned than Bois Blanc which he says was seven or eight miles from the schooner. Then allow me to turn you to the maps, where you will find that if one place himself on the ice one and a half miles from the Canada shore, and nine miles below Amherstburgh, he will be somewhat nearer one of the islands called "the Sisters" than Bois Blanc, or else maps are not to be believed!

While we find that many of our species are apparently less, none are more than *men*, and the wisest head is often in error and mistaken!

Then although the two gentlemen who have been adduced as witnesses against me on this trial, swear positively to having captured me within one mile and a half of the Canada shore, I urge, may they not be mistaken in that point, as well as in the other facts and circumstances testified to by them, and in which they are clearly shown *to be mistaken!*

Their assertion that I was taken within one and a half miles of the Canada shore is but the expression of their opinion of the distance, based on no fact whatever that can be relied on.

It is not now necessary for me further to detain you in canvassing the testimony adduced on this trial. If this is a court instituted by law, which is to be governed in its decision by the constituted laws of the land, as I trust it is, and is now disposed to vouchsafe to me the promise made by Col. Prince at the moment of my arrest, as he himself has testified to you "that I should have the full benefit of the law, and should not be ill-treated." It will be scarcely necessary for me to urge to you that all acts, circumstances, or facts, which have been here detailed to you in evidence as having transpired in the United States or beyond the limits of this Province are no evidence here, as it will manifestly appear to you that it would be the height of injustice to me to change the *venue* of this trial to the United States, where your process for witnesses could not reach, and if it could, this court has *no legal authority* to take cognizance of acts of mine done in the United States, to whose laws I am alone responsible therefor, or that you will reject *all the testimony* which does not refer directly to the matters contained in the "charge," as well as that which refers to any thing which transpired before the "act" under which this court is organized was passed.

The first part of the charge against me alleges that I am "a citizen of the United States of America—and that the United States of America are or were at peace with the United Kingdom of Great Britain and Ireland."

That I am a citizen of the United States is sufficiently proved by Col. Prince. He having testified that at the time of my capture I said "what do you want—we are American citizens, going about our own business?" Thus my citizenship is fully established. But I deny that there is any proof before this court—of any legal kind whatever—that the United States and Great Britain are at peace—search your minutes—and you will find me correct—yet that the two countries are at peace is part of the charge, it is one of the facts that must exist in order to make up the offence, by the provisions of the act—and therefore it must be proved—it cannot be inferred by the court. If the two countries were not at peace there could be no offence under the act—and may there not have been a declaration of war by one of the countries against the other on the 4th of March, the day of my capture, and that fact unknown to this court at this time. I only suggest what might be for your consideration.

It is a well established rule of law—that all those facts necessary to have existed in order to constitute one offence—and which must therefore be contained and set out in the charge must be proved!—Then here is an important defect in the proof under the charge—as it is drawn up—if a charge it might be termed—and no inference can supply it.

When there is a failure of evidence tending to establish any one essential averment—the court directs an acquittal in a criminal—or directs the Plaintiff to be non-suited in a civil case, see. 400, 1, Starkie. Again every material and essential allegation and every circumstance descriptive of its identity must be proved as annexed, 387, same authority.

The second part of the "charge" against me alleges "that I had joined myself on or about the 26th day of December last, at Navy Island, in the district of Niagara, in the Province of Upper Canada, to William Lyon McKenzie, and others, unknown subjects of Her Britannic Majesty, who were then and there (on Navy Island,) traiterously in arms against Her Majesty after the 12th day of January last."

The first attempt at proving this part of the "charge" was by the introduction of the paper by Col. Prince, as a witness memorandum of one admission made by me—wherein I think it is said I admitted I had been on Navy Island as second in command to General Van Rensselaer. Had the paper been legal evidence, which I contend it was not, it does not prove me to have been joined to any of Her Majesty's subjects.

On the cross examination of Col. Prince in his answer to my 3d question put to him (upon being recalled after the Honorable John McCauley had been sworn and testified,) he swears that at the time of the examination spoken of at Amherstburgh on the 3d of March last past, that I said "I had been on Navy Island with Van Rensselaer and McKenzie, and that I was dissatisfied or disgusted with McKenzie, and that McKenzie had been plotting against me on Navy Island."

And in answering to my next question to the same witness—he says that I stated at the same time "that I had been on Navy Island" "second in command under Van Rensselaer," and "that I had left the Island on or about the 26th of December last." But this is no evidence in support of this part of the charge.

Capt. Girty here also testifies that he was present at such examination, and that I had admitted I was on Navy Island, second in command and left it.

This is all the testimony adduced on the part of the prosecution, touching that portion of "the charge against me, I have named as seemed in order until we come to the testimony of Matthew Hayes, and whereas this witness as I am to presume, was introduced on the part of the prosecution for the express purpose of establishing the part of the "charge" I have last named, I will now attempt to canvass his testimony, and show you what, in my opinion, it amounts to, as well as what colors the witness has carried off from the stand.

This "Matthew Hayes" on his direct examination, has sworn that he went upon Navy Island on the 21st of December last, where he saw W. L. McKenzie, myself and Mr. Gorham; who told him he came from New Market, in Upper Canada. That he saw me on Navy Island from the 21st to the 29th day of December last, that I was then in the capacity of second in command, that I was Brigadier General, that he saw me leave the Island, but is not positive of the day—that I wore a sword but no uniform, that the people on the Island were generally armed—that on the day I left the Island I gave up the command I held to Major Vreeland, who then took my place—that I addressed the people on leaving the Island.

Here I might have passed this witness with perfect safety, as he had not testified to one fact contained within the "charge," except that I had been on Navy Island—but that I had deemed it proper for me by permission of the court to put him upon his cross examination.

That I was on Navy Island a few days in the month of December last—I have never disputed or denied, but I do most solemnly deny that I was there ever joined to any of Her Majesty's subjects "who were then and there t..terously in arms"—and I challenge any proof to establish such a fact. I was only joined to General Van Rensselaer who was a citizen of the United States.

In answer to the 10th question put by me to this witness "Hayes" he swears that Gen. Van Rensselaer was in command at Navy Island while I was there, except when he was gone—then that I was in command, and in answer to my 11th question, he swears that he understood Gen. Van Rensselaer to have been a citizen of the United States. There is no proof that he was not.

In his direct examination "Hayes" has sworn, it is true, that W. L. McKenzie was on Navy Island while I was there; but in answer to this, I say—you can find no jot or tittle of evidence in your minutes that the W. L. McKenzie seen then and there on Navy Island, was a subject of Her Britanic Majesty, for no such testimony has been given or hinted at. It has not been testified by any witness, or admitted that he had ever been in Great Britain, Upper Canada, or any of Her Majesty's dominions.

"Hayes" has also testified before you that a Mr. Gorham was there, who told him he came from New Market, in Upper Canada—and that he then acted as Aid-de-Camp to Gen. Van Renssalair, now Mr. Gorham having said he came from New Market, Upper Canada, does not prove that he was a British subject, for he might have come from New Market to Navy Island, as it is said. Yet still he may also have been a citizen of the United States, or some country other than Great Britain, suppose, however, Mr. Gorham had told wit-

ness he was a subject of Her Britanic Majesty, and his having said so had been offered, to be proved by this witness such testimony would be inadmissable not having been said in my presence, and being the mere say so of a third person. But suppose Mr. Gorham was on his trial instead of myself, proof that he had stated himself to be a subject of Great Britain, would be good evidence against himself of that fact, but not as to another: such is a settled rule of law.

In answer to a question put by the court, this "Hayes" has sworn that "there were from forty to fifty present, whose names he did not know," whom witness understood were British subjects, that many of them told him so, and he had opportunities of conversing with them and has no doubt of their being British subjects.

There are two legal methods of proving the subject or citizenship of individuals, it may be proven by witnesses who can depose to a knowledge of the individuals birth or nativity —or it may be done by showing that the individual had resided in the country of which it is alleged he is a subject or citizen for a time—and that he was then reported a subject or citizen of the country—and had exercised the privileges of subject or citizen.

The first knowledge that is usually acquired by the individual of another, is the name—the character comes afterwards—and let me ask, what knowledge could this man have of the character of men of whose names he was ignorant—how was it possible that he should know any persons were subjects to Great Britain, before he had first learned their names; but he says "they told him so," now suppose they did, it is but the mere statements of third persons, as I before have said, and proves nothing here. This witness has said after having the words put in his mouth by the Judge Advocate "that he had had opportunities of conversing with them, and had no doubt of their being British subjects." The rule of law as I have before noted, is that the best evidence the case will admit of must be given. I have called your attention to the two modes of proof, of which the case admits, this is neither, and is no proof in law; it is professedly the mere opinion of an obscure individual, based as witness says it is on the statements of third persons. It is a rule of law, as I have before remarked, that statements of third persons, can never be given in evidence against party on trial, who is not proven to have been present at the conversation—then certainly an opinion based on such statements—cannot be evidence to prove a fact. If a rule be established to admit such testimony, whose life shall be safe, and whose liberty vouched safe to him? No man thereafter shall be able to control his fate. Fact are things, that can only be established by proof of positive knowledge.

Witnesses are permitted to state facts alone, it is the province of

the court to form opinions from the facts placed before it. The only exception to this rule is in case of scientific men, who are allowed to give evidence of their opinions of sciences on matters connected with their profession of which no personal knowledge can be arrived at. From conversing with some 40 or 50 individuals, whose names this witness did not know, he has told you "he had no doubt they were British subjects."

Now by examining his answer to the 48 question proposed by me to him, you will find that this man has testified to his having been examined by Col. Kirby, Col. McNab, and a magistrate of Chippewa, and as it appears from that time to this, he has remained a prisoner. Then by examining witnesses' answer to the 20th question proposed by me to him, you will find he has sworn "that he did not know on what charge he was then confined. This witness would seem to exhibit an extraordinary acuteness in matters unimportant except as to others, while he appears so extraordinary dull in coming to conclusions in matters all important to himself. Shall it be said, this court believes this witness, when he tells them he did not know on what charge he stood committed. If not, then comes the general rule—if the witness has testified falsely in relation to one point, he is not to be believed on any poit—and let me ask you, Gentlemen, if you could for a moment be induced to put me in jeopardy upon the doubts of so doubtful a witness as this "Matthew Hayes"?

To a question put by the court to this witness "Hayes" whether he was aware that there was a Provisional Government established on Navy Island, and if so who were the members of that Government? He swears there was a "proclamation" on the Island, establishing a Provisional Government, and McKenzie was chairman of it pro tem. But he could not state the name of any officer forming this Government—all that he could say was that Mr. McKenzie was a chairman of a committee who framed a "proclamation," but the object of that government, its powers or constitution were all unknow to him. Why is not the "proclamation" produced?—for all this court legally knows, it was a proclamation in obedience to some commands issued from the Executive of this Province. The rules of evidence require that the paper spoken of, the "proclamation," should be produced or its absence accounted for, before secondary evidence of its contents could be received. Now this attempt to prove the existence of a Provisional Government on Navy Island, while I was there, even if in the hands of others, then subjects of Her Majesty, has been so fruitless it needs no further comment from me. By refering to his testimony on this point in your minutes, you will readily come to the conclusion that no such "Provisional Gov-

"comment" existed on Navy Island, and that while testifying on this subject Matthew Hayes knew not what he was talking about.

This witness "Hayes" having testified that provisions were brought from the American shore to Navy Island by Americans and Canadians, in my 19th question proposed to him, I asked him "what Canadians brought provisions to Navy Island, whilst I was there?" to this witness answered "there was one McCarty and one John Conner who acted as boatmen, and McCarthy belonged to the people of Navy Island, and Conner belonged to the Caroline steam boat—he told me so himself." Now is this any proof that this McCarthy is a subject of Her Britanic Majesty? I urge that it is not.

To live in Canada, or be an inhabitant of Canada would constitute an individual a Canadian—but it does not follow, that as a matter of course a Canadian is a British subject. A Canadian in the common acceptation of the term, is often otherwise, as in the case with this McCarthy—of whom I have the most creditable information, that he was a native born citizen of the United States, of Crawford county, Pennsylvania; who had there been a Captain of the Militia of Pennsylvania, and who though he had been a resident for some years in Upper Canada, has never been a subject of Great Britain. If I was afforded the necessary time and opportunity to procure the witnesses, I could prove by positive testimony what I here state in relation to this McCarthy—but such a step is not made necessary, for from the manner of his testimony it is evident this witness knew nothing about this McCarthy.

You will perceive by refering to this witnesses' answer to the 30th question I proposed to him, he swears one Rogers belonged to Canada. He told him he was from Chippewa in Upper Canada, and then he said "I have to add I have no knowledge myself of what country he was a native." Now is it not evident that this witness would have made the same explanation in relation to McCarthy if requested?

Again, had either McCarthy or Rogers actually been subjects of Her Majesty—which I deny—there is no testimony before this court that I knew that fact—or that there were any circumstances thrown around either of them—or any others who have been named as British Subjects or Canadians, whereby I could have known that they were such subjects. That they were on Navy Island is no proof of the fact—for as it is in evidence before this court, by the showing on the part of the prosecution, that an American citizen was in command of Navy Island while I was there—I an American citizen was second in command—an American citizen was third in command—and that the principal part of the people who were there on

the Island were American citizens, of whom I was one, had assumed the authority themselves to go on Navy Island.

There then is every tint and shadow of proof which has been adduced on this trial to establish "that I was ever joined to any of her Majesty's subjects on Navy Island," as I am charged, and which by a legal or rational construction as proof or testimony must be acknowledged entirely insufficient to establish this part of the "charge" upon which I am arraigned. For I am not to believe for a moment if it had been shown that I had known that this "Matthew Hayes" was a subject of Great Britain as he has now sworn he is, while on Navy Island, it would be held by you that I was joined to him within the spirit and the meaning of the "Act," when you recollect he testified he was prisoner there, detained against his will, who will say an officer or individual in command could be joined to a prisoner?

Again, there can be no such thing as a joining between two persons when one is repugnant to the union or connexion.

To that part of the "charge" against me which alleges "that William Lyon McKenzie and others, acknowledged subjects of Her Majesty were then and there (on Navy Island) traitorously in arms against Her Majesty after the 12th day of January last," there is no attempt at proof.

If you will refer to your minutes you will find that there has not been one item of evidence adduced on this trial showing that William Lyon McKenzie or any other person named on this trial, or claimed as subjects of Her Majesty the Queen, (and to whom it has been pretended I had been joined on Navy Island) were then and there (on Navy Island) traitorously in arms against Her Majesty after the 12th day of January last within the limits of this Province aforesaid, either with or without myself. But that by the evidence of the witness "Hayes" the only one who pretended to give evidence at all on this part of the charge, quite the contrary is shown.

In his direct examination "Hayes" says I left Navy Island some time about the 28th or 29th day of January last—not positive of the day—and in answer to my 7th question proposed to him—he says I was not on Navy Island after the burning of the Caroline; and in answer to my 23d question proposed to him he swears, that he left the Island on the 4th of January, after McKenzie had left the Island, by permission of Van Rensselaer;—and in answer to my 30th question proposed to him he swears he did not return to the Island after the 4th of January last—so it is in evidence that McKenzie and myself and this same "Matthew Hayes" were all off from Navy Island by the 4th of January last; and in answer to a question put by this court, this witness "Hayes" has also sworn that he never had

seen me since he left "Navy Island until he saw me in this court."

Now, although I think it must be conceded that so far as my rights and interests are concerned, it is a matter quite immaterial, whether you discredit the whole of the testimony deposed by the witness "Hayes," or whether you take the whole of his statement to be true, as you must, if you take any part thereof, yet I cannot forbear to call your attention to some of the peculiar features of this man's testimony.

Will it not seem to you, Gentlemen, as military men, a thing very extraordinary that this "Hays" should have been appointed to the very important and confidential station of Adjutant, if he had been detained on Navy Island against his will? The situation of itself must have given him abundant opportunity to have escaped without danger, if he had been disposed to leave. In answer to my 22d question proposed to him he has sworn that "I told him he might stop with me in my quarters"—and in his answer to another question put by me, he said he did stop with me in my quarters while I was there on the Island; and this witness has also testified, as I have before noticed to you, that I was second in command on the Island; and some part of the time I was there, in command, Van Rensselaer being absent; and in answer to my 28th question proposed to him he swears, I held the authority for granting permission to leave the Island—and yet while he was there against his will (as he says) a prisoner—messing with me in the same quarters. He says in answer to my 23d question proposed to him "that he never applied to me for permission to go from the Island." And let me ask when did he leave the Island according to his own story? I will answer the question in his own words, "many days after I had left the Island, and not until after he had been displaced from his office for want of efficiency—and his friend McKenzie had gone."

I will now conclude further comment on "Matthew Hayes'" testimony, by refering this court to the following just and reasonable rule of law—"That a witness who gives false testimony as to one particular, cannot be credited as to any, according to the legal maxim, *falsum in uno, falsum in omnibus.* The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. "Truth in a witness' testimony cannot be partial or fractional."—524 *Starkie.* Is not this rule applicable to "Hayes'" testimony?

As to the statements made by me on my examination before the then Justice of the Peace at Amherstburgh,—I do most positively dispute the witnesses, (Prince and Girty,) as to having said any thing which shall justify them in believing, for a moment, I meant to be understood as "desirous of entering into the service of Great

Britain against my own country"—as the witness Prince has said—or "of becoming Queen's evidence," as the witness Girty has it. For, let me assure you gentlemen, nothing was further from my mind, than either. I was born a Democrat—I was christened with democracy in my cradle—and was taught it upon my father's knee, and now, although individuals may wrong me and treat me with injustice, in my feelings I shall abide with my country and her institutions until this heart shall cease to vibrate, and reason shall fail to hold her own. The only remark made by me on that occasion which could possibly have been tortured into what either the witnesses Prince or Girty have made me say, was to this effect, and no more, "that to destroy me at this time would be an useless sacrifice—as I had long since ceased having any connection with those who were in array against the government of this country—whereas to preserve me, I might be of some use—as I was about to compile a book, giving an account of the recent commotion on the frontier, and in Upper Canada—which, if permitted to do, to the loyal subjects of this province, would be no injury, and in speaking as I did of the robbery which had been perpetrated against me in Monroe, Michigan, I may have, and as I think, I did, use some desponding expressions which however amounted to nothing like what the witnesses have fancied I have said.

I think, gentlemen, it cannot be otherwise than apparent to you that you are not here merely to act and decide for yourselves on the mere matter before you—but express the opinions of a whole people on a national measure, and I may suppose with such a view, as discreet men, such of you have been selected as members of this tribunal. Then being a foreigner, as I am, I beg you will allow me in the plain and homely language of my country to call your earnest attention to some of the facts and circumstances which have appeared before you, and which exhibit to my mind a feature in this trial most extraordinary!

I am not going now to raise a ghost in the shape of a technical question of law, to which "none may speak," neither am I going to disclose or divulge a hidden secret to the wonder of the gaping world, for the thing is now public, and the circumstances already before the people, and although you may not have entered it in your minutes of these proceedings, nevertheless it is a part and parcel of this trial, and now by no earthly power can it be erased or blotted out—the figure has been impressed upon many hearts.

Since my capture by the the two persons who have been produced as witnesses against me, I have had no communication whatever with the people of my own country, or any of the members of the government thereof—yet on the examination of the first witness pro-

duced against me, if I rightly recollect—I had it intimated to me in court that a committee of my own countrymen had inspected the place where I was captured, and had decided it to be on the Canadian side of the waters!—and on the motion of one of the members of this court, a question was proposed to the second witness—inquiring if such a committee had inspected the spot, and so decided. That such testimony as the question proposed was irrelevant and improper, could not escape the least discerning mind.

The enquiry would stand isolated and alone as the merest matter of disconnected hearsay evidence—the unfounded opinions of unknown at least, and perhaps ideal persons. To such an enquiry (as expected) I was ready to object, but by this court I was forbid offering my objections to the enquiry—the court was cleared, and the question proposed and put by the court—was withdrawn, and upon my coming in, I was informed by the Judge Advocate in the presence of the court, that the question would not be put, "although the court had decided that it was legal to pursue the enquiry." To such proceedings I protested that if this court had ever intended to put the question proposed, it was due to the court, as well as in justice to me, that I should have been allowed to raise my objections with such reasons as I had to give—that the impression might not go out, that such a committee had made such examination, and concluded so unfavorable opinions for me that I was afraid to have evidence given of it; and that this court, although legally entitled to entertain the enquiry, had without hearing my objections determined in mercy to me, to reject the testimony. This circumstance as well as the showing of the prosecution—establishes the fact conclusively that these two witnesses who are Magistrates of the District, into which I was first brought after my capture—and the very same persons who made the capture—from that time have both been well advised of my intentions to contend and urge, on any trial I might be put upon in this country– that when captured I was on the waters of the United States. The gentlemen who have been so introduced as witnesses against me have testified that they captured me on the 4th of March instant, on the ice at the head of Lake Erie, and as they say a mile and a half from the Canada shore. Now, if this had been so, knowing as they did I did deny having been on the Canada shore at the time of my capture, those witnesses who are both Justices of the Peace, as I have said, could have procured some honorable and disinterested gentlemen, who had in no manner been concerned in the arrest, together with a surveyor, to have went to the place of capture, which could have been easily pointed out by the tracks of the horses on the ice, and had the surveyor taken the bearing and distances of all the prominent objects near—and if it

had been within one and a half miles from the Canada shore, that distance or double the same might have been easily chained on the ice—and by such evidence, the place of arrest would have been established beyond a doubt! To survey the ground where "the place" is to come in question on any trial of importance; is usual in Great Britain as well as in the United States, and let me ask you, gentlemen, is not this trial of great importance—not only because it involves the life and liberty of a fellow mortal, but the honor of a great and powerful nation. Then why, let me ask, has not this survey been made, and the result proved on this trial? For while man may turn a thousand ways the needle is true to its pole, and while the eye may be deceived, the chain can never lie! and now still protesting, that when I was taken, I was on the waters of my own country, which if true, I cannot have been guilty of "being in arms against Her Britannic Majesty within this province," I would seriously ask you, gentlemen, as men of sense and honor, if you are prepared to stake your own and your country's reputation upon testimony so vague, contradictory, uncertain, and illegal, as that which has been adduced against me on this trial?

I am now drawing my defence to a close; but before doing so allow me to advert to the cases of Arbuthnot and Ambrister. These would have been an analogy to mine, had I been, which I deny, in arms, or in hostile array against Her Majesty, with Her Majesty's traiterous subjects, within this province, as expressed by the act. The particulars of their cases are well known. they were British subjects charged with aiding certain Indians in their hostilities against my native country —they were seized upon by Gen. Jackson in the very act, brought before a Court Martial, as I am now brought, and under the sentence of such court they were executed. What were the sentiments and feelings of the people and government of my country, aroused by these acts may be collected from the report of a committee on the Seminole war, made to the Senate of the United States Congress, 24th of February, 1819. If I were allowed I would wish to read several parts of that report; but some portions of it are so applicable to my case and situation, that I must crave the indulgence of this court to make some extracts. It is said by the committee in their report "In reviewing the execution of Arbuthnot and Ambrister, your committee cannot but consider it as an unnecessary act of severity on the part of the commanding Gen. (Jackson,) and a departure from that mild and humane system towards prisoners which in all conflicts with savage or civilized nations, has heretofore been considered not only honorable to the national character, but conformable to the dictates of sound policy. Those prisoners were subjects of Great Britain with whom the United States are at

peace, having left their country and united their fates with savages, with whom the United States were at war, they forfeited their claim to the protection of their own government, and subjected themselves to the same treatment which might according to the practice and principles of the American Government, be extended towards those with whom they were associated. No process of reasoning can degrade them below the savages with whom they are connected,—as prisoners of war they are even entitled to claim from the American Government, that protection which the most savage of our foes have uniformily experienced when disarmed, and in our power. Humanity shudders at the idea of cold blooded execution of prisoners disarmed and in the power of the conqueror."

Another extract from the same report says "The principle assumed by the commanding General, that Arbuthnot and Ambrister by uniting in war against the United States while we were at peace with Great Britain became "outlaws and pirates, and liable to suffer death," is not recognized in any code of national law; nothing can be found in the history of civilized nations which recognizes such a principle, except a decree of the executive directory of France during their short career of folly and madness, which declares that neutrals found on board enemies ships should be considered as pirates." See Fol. 132, L. 133, Annual Register for 1819, where this report is given. Such was the language of my countrymen, and such will be the language of Great Britain.

Gentlemen, since this trial commenced I have seen in the newspapers a document which is said to be from the hands of His Excellency the Lieutenant Governor of this Province, and which has provided me with an argument I may use in my behalf on this trial, although not essentially necessary under the state of the proceedings.

His Excellency is said to have stated that "punishment cannot be justifiably resorted to as an act of revenge; it is only to be sanctioned as the necessary means of preventing the recurrence of crime." That such are the legitimate principles of an enlightened and liberal mind, who will gainsay?

Then if such had been the case, that these proceedings had been sanctioned by your constitution and laws, and the laws of nations, and the "charge" against me had been sufficiently drawn up, and fully and substantially sustained by the proof, where then would you find the "necessity" of applying to me the provisions of the act under which I am here arraigned? What other motive than "*revenge*" could move you now to inflict upon me its terrible penalties? It was not I that sustained and kept together a large force on Navy Island from the 26th of December to the 12th of January. It was not I that procured the arms and amunition, and other military

stores for the expedition fitted out against Malden, with whom it is said I chanced to be on the 28th and 29th of January last, nor I who enlisted the men for that expedition. It was not I who fitted out or led on the party of men whom from the United States took possession of Fighting Island in the Detroit river—for it has been here sufficiently proved that I had no connection with them. It was not I who fitted out or led on the party who took psssession of Pele Island, nor has it been urged that I had ever any connection with them. It was not I who fitted out or led on the party who attempted to land at Abino. It was not I who fitted out or led on the party who took possession of Hickory Island, nor do you charge me with any of these acts. The rebellion that was in this Province has been crushed by your own power, and all these parties which had been in array on your frontier dispersed in a manner forbidding the possibility of a recurrence. I have never moved or excited the subjects of Her Majesty in this Province to rebel, nor do I possess the power to do so. I am a stranger, and without influence in the Province with those who have been in arms against you. On your frontier I have had no connection since the 9th of January last, and after the middle of February my disconnection with them was notorious. And now if it were possible for any person to put in array a belligerent force again on your frontier, that person is not myself, for my influence there, for such a purpose, has long since been at at end. And I ask what other motive than "*revenge*" could you assign for an act which would have no other effect that to administer to the grosser passions of mankind, and gratify such as are to be found in every country ready to cry out "crucify him, crucify him," and by whom ere you commenced your labors, I had been tried, condemned and executed, and these bones of mine had become but part of the naked and offensive cabinet of some surgeon's study! Justice under no circumstances will make such a demand. The high, the enlightened, and the honorable of this Province, I am persuaded, desire not my destruction.

But what is my offence? I am not charged with murder or rapine, for I have deprived no man directly or indirectly of his life and liberty. I am not charged with robbery or marauding, for I have neither taken or destroyed the property of any man. I am not charged with having disturbed the domestic peace of the country, for it was not I who set this Province in civil commotion. I am not charged with having entered this Province for the purpose of plunder or gain, for the same testimony that would establish the fact, that I had ever been in this Province with an armed force under my command, will prove that when I returned I left a large quantity of property untouched and unmoved, and you have made legal proof

here for me that I had never authorized, sanctioned or approved of an attack being made on the village of Amherstburgh on the evening of the 9th of January last.

Then what more am I charged with, than has been done by honorable Britons in Venezuela, Buenos Ayres, Chili and Peru, while those countries were Provinces of Spain. What more am I charged with attempting, than honorable Britons have lately accomplished in Portugal? What more am I charged with than is now being done by honorable Britons in Spain, by the consent and authority of the British Parliament, commanded and led on by a late member of the House of Commons.

But, I am told, that "by writing and publishing certain papers in a newspaper of the United States called "Despatches" and "Proclamations," I had committed "an indignity to the British Crown." An American newspaper containing the said papers has been introduced and read, and although you *must know*, you have no legal right to call an American citizen to an account for his acts done in the United States, yet I cannot but believe that the publication of those papers which never were promulgated by me or attempted to be published in this Province, was the moving cause of my prosecution before this court, and if such would be in accordance with gentlemanly propriety, I could inform you of the foundation of my belief.

I have called no witnesses. The testimony adduced on the part of the prosecution does not require it. Witnesses that would have testified conclusively in my favor could not be procured but from a foreign country—their residence too remote from this scene to enable me to reckon upon their production in time for this trial, whatever exertions I could have put in force, notwithstanding.

Gentlemen, you have now before you the facts of the case, as made out on the part of the prosecution, and the law applicable to the same—rather a portion of that law—for the principles in support of my objection have been only slightly touched upon, the questions are far from being exhausted, however lengthy my defence may appear.

The objections taken, namely, That one half of this court never appear to have sat on a previous court martial.

That the President of the court had never before sat on a court martial.

That one of the members of the court is an officer on full pay in the regular service, and therefore ineligible, according to the only law applicable to the case.

That, first of all, the Act under which I am being tried is unconstitutional.

That the "charge" prefered against me is not sufficiently specific as required by the statute.

That the essential averments set out in the "charge" are not sustained by the evidence adduced—there being no proof before the court to establish the fact that any of Her Majesty's subjects, with whom it is alleged I was joined on Navy Island, were traiterously in arms against Her Majesty within this Proviece, on the said 12th day of January, or any time thereafter, either with or without myself.

That an "Act"—not affecting all her majesty's subject—but particular individuals—and these evidently foreigners, was a printed Act—and therefore ought to have been duly proved, by the production in the usual manner of a sworn copy.

That the Militia law passed the 6th of March last, under which you profess to sit, has an ex post facto operation as regards me, and therefore is not applicable to me.

That the maps produced, are not legal evidence of the boundary between the two countries.

That I was prevented by the court from having the benefit of a cross examination of the Surveyor General, to which I was entitled.

That the proclamation spoken of as instituting a provisional Government on Navy Island—even if relevant to the case, has not been duly proved.

That the paper purporting to be my examination, or admissions, did not contain the whole of those admissions, which I was desirous of proving by a cross examination of Col. Prince, but was prevented of so doing by the court.

That I did not sign, nor was I required to sign this paper, containing a part only of my admissions, and therefore that it could not legally be given in evidence.

All these objections, and others I have raised during the investigation of my case, will, I am persuaded, undergo your serious and calm consideration.

I have now finished. The importance of this case—not affecting merely the humble individual who now addresses you—nor only the inhabitants of this Province—or the citizens of the neighboring Republic, of which I am proud of being a member—but involving questions affecting the rights, liberties and even lives of the inhabitants of every independent nation; I say the importance of this case, which is now left for your determination, must be apparent to every person, however exalted in rank or humble in station.

TH. J. SUTHERLAND.

Toronto, April 2d, 1838.

APPENDIX.

NO. I.

AN ACT to protect the Inhabitants of this Province against lawless aggressions from the Subjects of Foreign Countries, at Peace with Her Majesty. [Passed 12th January, 1838.]

WHEREAS a number of *persons lately inhabiting the State of New York, or some one of the other United States of America*, have within the said State of New York, lately enlisted or engaged themselves to serve as Soldiers, or have procured others to enlist or engage themselves to serve as Soldiers, and have within the *State of New York*, collected Artillery, Arms and Ammunition, and made other preparations for a hostile invasion of this Province, under the pretext of assisting certain Traitors who have fled from this Province to the said United States: *And whereas*, the said persons, without the authority of their Government, and in defiance of its express injunctions, *have actually invaded this Province, contrary to the faith and obligation of the Treaties subsisting between the United Kingdom of Great Britain and Ireland and the said United States*, and during the continuance of the relations of amity and peace between the two Countries: *And whereas*, it is necessary for protecting the peace and security of this Province, to provide for the prompt punishment of persons so offending: *Be it enacted*, by the Queen's most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of Great Britain, entitled, "An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's reign, entitled, 'An Act for making more effectual provisions for the Government of the Province of Quebec in North America,' and to make further provision for the Government of the said Province," and by the authority of the same, *That if any person, being a citizen or subject of any Foreign State or Country at peace with the United Kingdom of Great Britain and Ireland, having joined himself before or after the passage of this Act, to any subjects of our Sovereign Lady the Queen, Her Heirs*

or Successors, who are or hereafter may be traitorously in arms against her Majesty, Her Heirs or Successors, shall after the passing of this Act, be or continue in arms against Her Majesty, Her Heirs or Successors within this Province, or commit any act of hostility therein, then it shall and may be lawful for the Governor of this Province to order the assembling of a Milita General Court Martial, for the trial of such persons agreeably to the Militia Law of this Province, and upon being found guilty by such Court Martial of offending against this Act, such persons shall be sentenced by the said Court to suffer death, or such other punishment as shall be awarded by the Court.

2. *Be it further enacted by the authority aforesaid*, That if any subject of Her Majesty, Her Heirs or Successors, shall within this Province, levy War against Her Majesty, Her Heirs or Successors, in company with any of the citizens or subjects of any Foreign State or Country, then being at peace with the United Kingdom of Grent Britain and Ireland, and offending against the provisions of this Act, then such subject of Her Majesty, Her Heirs or Successors, shall be liable to be tried and punished by a Militia General Court Martial in like manner as any citizen or subject of a Foreign State or Country at peace with Her Majesty, Her Heirs or Successors, is liable under this Act to be tried and punished.

3. *And be it further enacted by the authority aforesaid*, That the citizen or subject of any Foreign State or Country, offending against the provisions of this Act, shall be deemed guilty of felony, and may, notwithstanding the provisions hereinbefore contained, be prosecuted and tried before any Court of Oyer and Terminer and General Gaol Delivery in and for any District of this Province, in the same manner as if the offence had been committed in such District, and upon conviction shall suffer death as in cases of felony.

NO. II.

AN ACT to amend, and reduce into one Act, the Militia Laws of this Province. [Passed March 6th, 1838.]

WHEREAS the several laws now in force for embodying, organizing and training the Militia of this Province are, in many instances, defective and ineffective: *Be it therefore enacted*, by the Queen's most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act passed in Parliament of Great Britain, entitled, "An Act

to repeal certain parts of an Act passed in the fourteenth year of His Majesty's reign, entitled, 'An Act for making more effectual provisions for the Government of the Province of Quebec in North America, and to make further provisions for the Government of the said Province," and by the authority of the same, That from and after the passing of this Act, it shall and may be lawful for the Lieutenant Governor from time to time, to divide the Militia of this Province into such number of Regiments or Batalions as he may deem most conducive to the efficiency of the saidMilitia, and under his hand and seal to appoint a sufficient number of Colonels, Lieutenant Colonels, Majors, Captains and other officers, to train, discipline and command the said Militia, according to such rules, orders and directions, as shall from time to time be issued by him for that purpose; which Officer of Militia shall rank with Officers of Her Majesty's Forces serving in this Province, as junior of their respective rank.

32. *Be it further enacted by the authority aforesaid*, That when the Militia of this Province shall be called out on actual service, in all cases where a General Court Martial shall be required, the Lieutenant Governor, upon application to him made through the Officer commanding the body of Militia to which the party accused may belong, or in case he be the accuser of the accused, then through the next Senior officer, shall issue his order to assemble a General Court Martial, which said General Court Martial shall consist of a President, who shall be a field Officer, and not less than eight other Commissioned Officers of the Militia: *Provided always*, that in all trials by General Courts Martial to be held by virtue of this Act, the Lieutenant Governor shall nominate and appoint the person who shall act as Judge Advocate; and that every member of the said Court Martial, before any proceeding be had before the Court, shall take the following oath before the Judge Advocate, who is hereby authorized to administer the same, viz:—"You, A. B., do swear, *that you will administer justice to the best of your understanding, in the matter now before you, according to the evidence and the Militia Laws now in force in this Province*, without partiality, favor or affection; and you further swear, that you will not divulge the sentence of the Court, until it shall be approved by the Lieutenant Governor; neither will you upon any account, at any time whatever, disclose or discover the vote or opinion of any particular member of the Court Martial, unless required to give evidence thereof as a witness by a Court of Justice, in due course of law: So help you God": And so soon as the said oath shall have been administered to the respective members, the President of the Court is hereby authorized and required to administer to the Judge Advocate, or the

person officiating as such, an oath in the following words :—" You, A. B. do swear, that you will not upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the Court Martial, unless required to give evidence thereof as a witness by a Court of Justice, in due course of law—so help you God" : And the Judge Advocate shall, and is hereby authorized, to administer to every person giving evidence before the said Court, the following oath :—" The evidence you shall give to this Court Martial, on the trial of A. B. shall be the truth, the whole truth, and nothing but the truth—so help you God" :—*Provided always*, that the Judgment of every such Court Martial shall pass with the concurrence of two-thirds of the members, and shall not be put in execution until the Lieutenant Governor has approved thereof.

An extract of the Militia Laws of the Province of Upper Canada, passed March 16, 1808,—*and in force until the sixth day of March*, 1838.

Sec. 23. *And be it further enacted by the authority aforesaid*, That when the Militia of this Province shall be called out on actual service, in all cases when a General Court Martial shall be required, the Governor, Lieutenant Governor, or person administering the Government, upon complaint and application to him made, through the Colonel, or officer commanding the body of Militia to which the party accused may belong, shall issue his orders to the said commanding officer to assemble a General Court Martial, which said Court Martial shall consist of a President, who shall be a field officer, *and twelve other commissioned officers of the Militia :* Provided always, that in all trials by General Court Martial, to be held by virtue of this Act, the Governor, Lieutenant Governor, or person administering the Government, shall nominate and appoint the person who shall act as Judge Advocate—and that every member of the said Court Martial, before any proceedings be had before that Court, shall take the following oath before the said Judge Advocate, who is hereby authorized to administer the same, viz :

" You A. B. do swear that you will administer justice to the best of your understanding, in the matter now before you, according to the evidence, and Militia Laws now in force in this Province, without partiality, favor or affection ; and you further swear, that you will not divulge the sentence of the Court, until it shall be approved by the Governor, or person administering the Government ; neither will you upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the Court

Martial, unless required to give evidence thereof as a witness, by a Court of Justice, in due course of law—so help you God."

And so soon as the said oath shall have been administered to the respective members, the President of the Court is hereby authorized and required to administer to the Judge Advocate, or the person officiating as such, an oath in the following words:

"You, A. B. do swear, that you will not, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the Court Martial, unless required to give evidence thereof as a witness, by a Court of justice, in a due course of law—so help you God."

And the said Judge Advocate shall, and he is hereby authorized to administer to every person giving evidence before the said Court, the following oath:

"The evidence you shall give to this Court Martial, on the trial of A. B. shall be the truth, the whole truth, and nothing but the truth—so help you God."

Provided always, that the judgment of every such Court Martial shall pass with the concurrence of two-thirds of the members, and shall not be put in execution, until the Governor, Lieutenant Governor, or person administering the Government, has approved thereof: Provided always, *that no officer serving in any of His Majesty's other forces, shall sit in any Court Martial upon the trial of any officer or private man serving in the Militia.*

NO. III.

OFFICE OF THE DETROIT MORNING POST,
January 11, 1838.

GEN. TH. J. SUTHERLAND,

SIR—Having received information of your arrival in this city, I would embrace the occasion to request respectfully, an answer to to the following questions:—

1. "Are the Banks of Upper Canada now solvent"?
2. "What are the intentions of the Patriots, if they succeed in their efforts to redeem the Upper Province, relative to those Banks?"

It is highly important that correct information should be obtained by our citizens upon these points—especially the latter—as a large number of our wealthiest men are stockholders in the Upper Canada Banks, and as there is in Michigan a large amount of their paper in circulation.

Any facts you may please to communicate on the great question at issue through the columns of the Post, I shall be happy to admit, provided such facts do not contravene the existing laws of the United States, or of this State.

Very respectfully,
Your obedient servant.
BENJ. KINGSBURY, Jr.

Detroit, 11th January, 1838.

Editor of Detroit Morning Post :

Dear Sir—Your note of this morning has been duly received and will be fully answered ; but having arrived in town from Bois Blanc at a late hour last evening, in a very bad state of health, I am unable to-day to do more than give you copies of despatches which I have forwarded to the Commander-in-Chief of our army, which you are at liberty to publish. Such parts of your inquiries as are not answered by the copies of papers enclosed, I will do myself the honor of replying to in detail, by an early hour to-morrow.

Very respectfully,
Your ob't serv't,
TH. J. SUTHERLAND.

(A.)

PROCLAMATION.

TO THE PATRIOT ARMY OF UPPER CANADA.

Companions in Arms.

True courage is always accompanied with high honor and with mercy to a subdued enemy.

We fight, not for plunder or power to oppress, but for liberty and sacred rights and the common cause of mankind.

Our friends have been plundered and driven from their homes, their wives and daughters dragged from their beds and exposed to the most outrageous insults, and almost every part of our territory is groaning under the most insupportable tyranny.

To redress these wrongs, we are assembled in arms. Let us behave like men who love justice, and scorn and defy oppression.

Soldiers of Liberty ! In order to insure success and a glorious victory, it will be necessary to enforce the most rigid military discipline.

No one, having joined the army, will be allowed without permis- of the commanding officer, to leave the ranks. Every desertion will be punished with death.

All orders must be strictly obeyed. No one must act under any circumstances but in obedience to the orders of the officer having command.

Every person *not in arms* must be protected in his person from all harm.

All private property must be respected. Not a single infringement of private rights or possession will escape the most severe punishment.

No one not in arms, or regularly enrolled, will be permitted to follow the camp. Every idler will be taken up and punished.

COMPANIONS AND SOLDIERS,

We march to restore, not to destroy, good order—to preserve, not to violate wholesome laws—to establish equal rights and justice, yielding to others as rigidly as we demand our own.

TH. J. SUTHERLAND,
Brig. Gen. Commanding 2d Division Patriot Army, U. C.
HEAD QUARTERS, 2D DIVISION,
Bois Blanc, U. C., January 9th, 1838.

(B.)

PROCLAMATION.

TO THE PATRIOT CITIZENS OF UPPER CANADA.

You are called upon by the voice of your bleeding country to join the Patriot forces, and free your land from tyranny. Hordes of worthless parasites of the British crown are quartered upon you to devour your substance, to outrage your rights, to let loose upon you defenceless wives and daughters a brutal soldiery.

Rally then around the standard of LIBERTY, and victory and a glorious future of independence and prosperity will be yours.

TH. J. SUTHERLAND,
Brig. Gen. Commanding 2d Division Patriot Army, U. C.
HEAD QUARTERS, 2D DIVISION,
Bois Blanc, U. C. January 9th, 1838.

(C.)

PROCLAMATION.

TO THE DELUDED SUPPORTERS OF BRITISH TYRANNY IN UPPER CANADA.

You are required to lay down your arms, and reture quietly to your homes. The Patriot Army of Upper Canada desire not bloodshed. We fight only for liberty, and personal and public safety.

Your persons and property shall be protected, all your private rights preserved to you, your homes secured, your possession untouched, on condition that you yield up your weapons and retire to your accustomed occupations.

You are now enjoying a moiety of liberty vouchsafed to you from motives of caprice or interest on the part of your Rulers. We will secure to you all the blessings of freedom by a permanent and an honorable tenure.

Avoid then the horrors of war. Enrage not soldiers already exasperated by oppression. Save yourselves from violence, and your property from confiscation. Cease resistance and all will be well with you.

TH. J. SUTHERLAND,
Brig. Gen. Commanding 2d Division Patriot Army, U. C.

HEAD QUARTERS, 2D DIVISION,
Bois Blanc, U. C., January 10th, 1838.

NO. IV.

PETITION.

To MARTIN VAN BUREN,

PRESIDENT OF THE UNITED STATES OF AMERICA.

The Petition of Thomas Jefferson Sutherland, now a Prisoner in the hands of the Government of the Province of Upper Canada—Sheweth:

That your petitioner is a native citizen of the State of New York, and owes allegiance to no other country than that of his birth.

That he now addresses Your Excellency on a subject not merely affecting himself—but involving in it, principles of momentous concern to the whole of the American people. If it were otherwise—if it were a case not likely again to occur—if he were the only person likely to be affected, by the course of proceeding that has been pursued towards him in this Province, he might forbear troubling you with this appeal; at least it would not be urged with the same confidence with which it is now made. But at this moment the fate of numbers—citizens of the United States—confined as prisoners in various parts of the Province of Upper Canada—must be decided by the final issue in your petitioner's case.

As briefly as possible your petitioner will proceed to state the most material points on which he asks for the interferance and protection of your Excellency, and the Government of tho United States—respectfully referring to the accompanying documents for a more detailed statement of the cause and circumstances weich have induced him to make this appeal.

The excitement felt by thousands of the people in those sections of the country bounding on Upper Canada, when a rebellion in December last broke out there, he does not deny extended itself to him, at the time a resident of Buffalo.

He considered himself as much justified in aiding the Canadians in their attempt at escaping from what was judged by many as tyranny and oppression, and establishing an Independent Government, as DeKalk—La Fayette—Kosiusko—and other foreigners were in giving their personal aid and assisting us in our Revolutionary contest.

As much justified as Col. Evans and his legion of British and Irish were in espousing the liberal cause in Spain—or as those Americans and English were who joined in the successful struggle made for liberty by the oppressed Greeks.

Precedents for the course your petitioner took might be found in the conduct of those men—natives of the two most free nations on earth, in aiding the South Americans against their former masters and oppressors.

Nor did your petitioner consider the state of Canada unlike that of Texas, where his countrymen by thousands rushed to the rescue, and mainly aided in throwing off the chains of an arbitrary and despotic master.

A short time convinced him that the parallel between the Canadians and those countries to which he has alluded, was not complete, inasmuch as that sufficient and necessary preparations had not been made beforehand by the Canadians to carry on successful revolt, and to withstand the power of the Government in whose hands all the arms and warlike stores, and official patronage of the Province were; and upon making this discovery your Petitioner retired from the service of the Canadian Patriots and from the ranks of those who still persevered in the designs to revolutionize the Province.

Having resolved on publishing an account of these revolutionry movements—and to trace the cause which had led to them, your petitioner had made arrangements to return home from Detroit, Mich. when he was robbed of his travelling trunk, containing his clothes, papers and property of value. And your petitioner was proceeding on the fouth of March last, in company with a young man also a citizen of New York, from Gibralter in Michigan, to Sandusky in Ohio,

—his route being on the ice on the United States side of the channel, when he was captured by one John Prince, a member of the Provincial Parliament of U. C., Colonel in the Militia, and Justice of the Peace of the same, with a body of men, armed with pistols, tomahawks and guns, whilst his only weapon of defence was but an indifferent, edgeless sword. That he and his companion, who likewise only had such another weapon, yielded themselves as prisoners—without any apprehension, however, that they were infringing any laws—and with a firm conviction that they owed responsibility to no other than their own Government.

Your petitioner refers your excellency to the accompanying evidence on the part of the prosecution, which proves incontrovertably, that they were within the limits of the United States. Independent of any other testimony, Col. Prince, one of the witnesses establishes that fact—for he swears that when captured, your petitioner and his companion were within half a mile of a schooner, which by refering to the other evidence furnished you, it appears that the said schooner—the only one to be seen in that vicinity for many miles was west of the West Sister island, which is within the limits of the United States.

That your petitioner was conveyed as prisoner to the city of Toronto, a distance of 300 miles, at a most inclement season of the year —and your petitioner was on the 13th day of March arraigned before a Militia General Court Martial convened in pursuance of an order of Sir F. B. Head, then Lieut. Governor of the province, and organized under a statute of the province passed two days after my capture, on charges as set cut in his defence—a copy of which accompanies this, and to which he respectfully refers.

That your petitioner pleaded "not guilty" to the charge prefered —and when put on his defence urged many matters which entitled him to an acquittal.

But in vain he objected to the constitution of the court—consisting of nine members only, instead of thirteen, as required by the act in force at the time of his capture. The act forming a court of nine members only, not having passed into a law until the 6th of March, two days after such capture, as before stated.

In vain did he object to one of the members of the court, being an officer of the regular army under full pay—a nomination expressly guarded against, by the only act under which they could summon a court to try him, if he were amenable to their laws.

In vain did your petitioner insist, however strenuously, being aware of its importance as a national question—that a law passed by the Provincial Parliament of Upper Canada 12th of January last, and under which he was tried, was unconstitutional—that it affected

the rights, lives and liberties of foreigners ; and interfered with and even annulled solemn treaties in full force between the United States and Great Britain. That Jay's treaty secured the right of way over the waters on which he was captured to every individual of each nation.

That the charges exhibited by the Judge Advocate were not sufficiently specified, as to time and place, as well as in other respects, more fully stated in his defence.

That the Court was sworn to try him according to the Militia Laws of this province, that not being a militia man he was not amenable to those laws.

That the act under which he was tried—not affecting merely Her Majesty's subjects, but others, foreigners—was therefore a private act, and ought to have been proved in the usual way by a sworn copy, which was not done.

In vain, also, did he urge that he did not come within the letter or meaning of this act—it not being proved that he was in arms after the 12th day of January, with any traitorous subjects of Her Majesty, either within or without this province.

As fruitlessly did he object that any legal evidence of the true line dividing the two countries, as settled by the Commissioners appointed under the treaty of Ghent, was produced—or that the maps, purporting to shew such division line were *copies* of the original maps prepared or sanctioned by such Commissioners—a pencil mark on such maps varying from the colored line was stated to be the correct line intended by the Commissioners ; but no satisfactory evidence was offered in confirmation of such statement.

That your petitioner urged his right to a cross examination of witnesses produced on the part of the prosecution, and urged this right on points very material to his defence. He insisted that the whole of the admissions he had made before Magistrates when captured should be inserted on the minutes of evidence—a part only of such admissions having been reduced to writing—and that if he were not permitted to obtain the evidence of such admissions by the cross examination of Col. Prince, one of those Magistrates, that no part of the admissions that happened to be reduced to writing should be given in evidence.

These and many other objections were all overruled by the Court Martial, and "your petitioner pronounced guilty of the charge prefered against him and sentenced to be transported as a felon to one of Her Majesty's islands during his natural life."

From such arbitrary and illegal proceedings and sentence, he now appeals to the power of his country, which he believes competent to grant relief. Firmly relying that his case, involving the fate

also of so many others, will engage your earliest consideration, and attention. And your petitioner prays that such measures may be taken by your Excellency as will release him from the effects of laws, passed by foreigners, and put in operation against one who has not, even if he were bound by them, infringed either the letter or meaning thereof.

And as in duty bound he will ever pray.

NO. V.

EXTRACT FROM JAY'S TREATY.

Sec. 1 It is agreed, that it shall, at all times, be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America, (the country within the limits of the Hudson's Bay,company only excepted,) and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other. But it is understood that this article does not extend to the admission of the vessels of the United States into the seaports, harbors, bays, or creeks of his Majesty's said territories; nor into such parts of the rivers in his Majesty's said territories as are between the mouth thereof, and the highest ports of entry from the sea, except in small vessels trading bona fide between Montreal and Quebec, under such regulations as shall be established to prevent the possibility of any frauds in this respect; nor to the admission of British vessels from the sea into the rivers of the United States, beyond the highest ports of entry for vessels from the sea. The river Mississippi shall, however, according to the Treaty of Peace, be entirely open to both parties; and it is further agreed, that all the ports and places on its Eastern side to whichsoever of the parties belonging, may freely be resorted to, and used by both parties, in as ample a manner as any of the Atlantic ports or places of the United States, or any of the ports or places of his Majesty in Great Britain.

LETTER TO GOV. ARTHUR.

To His Excellency Sir George Arthur,
Lieutenant Governor, &c.

Thomas Jefferson Sutherland, a citizen of the United States of America, now detained a prisoner by the Government of the Province of Upper Canada, would respectfully represent to Your Excellency, that it is his intention to present the circumstances of his

capture and detention to her Majesty the Queen of Great Britain and Ireland, to the end of relief, and that he may be liberated from his present condition and permitted to return to his country and friends. Wherefore he solicits Your Excellency to cause to be made and delivered to him a *certified copy* of all the proceedings taken against him by and before a Militia General Court Martial in this Province, with his defence, made before said Court Martial; and copies of the Laws or Statutes under which such proceedings were had, that he may lay the same, with his petition, before Her Majesty by an early day.

Very respectfully submitted to Your Excellency.

TH. J. SUTHERLAND.

HOME DISTRICT GAOL,
23d April, 1838.

LETTER FROM J. JOSEPH TO SHERIFF JARVIS.

GOVERNMENT HOUSE,
26th April, 1838.

SIR—I am commanded by His Excellency the Lieutenant Governor, to request you to be so obliging as to acquaint T. J. Sutherland, a convict in the Gaol of this city, under sentence of transportation, that His Excellency has received his memorial, requesting to be furnished with a "certified copy of all the proceedings taken against him by, and before, a Militia General Court Martial in this Province, with his defence made before said Court Martial—and copies of the laws or statutes under which such proceedings were had—that he may lay the same, with his petition, before Her Majesty, by an early day." In reply to this request His Excellency begs you to inform the Prisoner, that a copy of the Trial, and the documents connected with it, has been transmitted by His Excellency, to the Secretary of State for the Colonies.

I have the honor to be sir,
Your obedient humble servant
J. JOSEPH.

MR. SHERIFF JARVIS.

AFFIDAVITS.

STATE OF MICHIGAN,
Wayne County. } ss.

George R. Griswold of the city of Detroit, being duly sworn, deposeth and saith, that he is personally acquainted with Gen. Th. J. Sutherland, and that during the engagement between the Patriots and

the Canadians on Point aux Pellee Island, and while said Island was occupied by the Patriots on the 1st, 2d, and 3d of March, said Gen. Sutherland was in the city of Detroit, and that deponent believes said Gen. Sutherland was never on said Island,—and deponent further saith that said Gen. Sutherland had, prior to said engagement, entirely disconnected himself by his acts, and by open avowal from any further connection with the Patriots, and with any further measures hostile to the British government.

GEO. R. GRISWOLD.

Sworn and subscribed to before me, this 2d day of June, A. D. 1838.

BEN. KINGSBURY, *Notary Public*, W. C. S. M.

CITY OF MONROE, June 4th, 1838.

The subscribers being requested to give information, if any we can give, relative to Gen. Sutherland's loss of a trunk in this city, we can say so far as this—that on or about the 28th day of February, 1838, he, Gen. Sutherland, called at our store, in this city, and made known his losses, and we went to the Monroe House Tavern, and conversed with the Landlord and others on the subject, and could get no definite information, but were then, and now are of the opinion that he was robbed of his trunk there, and our opinion then was, and now is, that his trunk and contents were taken by sundry men claiming to be Patriots, who were then in this city.

Gen. Sutherland stated to us that he should go from here to Detroit in hopes to gain information of his trunk and contents.

J. HENRY MILLER.
Firm of J. H. & J. C. Miller.

Sworn to and subscribed before me, this 4th day of June, 1838.

ABNER MORTON, *Justice of the Peace.*

STATE OF MICHIGAN, *County of Monroe.* } ss.

Abner Morton of the city of Monroe, in said county, being duly sworn, deposeth and saith, that on the 28th of February, A. D. 1838, at Monroe aforesaid, Gen. Th. J. Sutherland, then, (as this deponent understood) late of the Patriot army, so called, applied to this deponent for a warrant against one Charles G. Irish, and furnished a complaint in writing, charging the said Charles G. Irish, on the 20th day of February, A. D. 1838, at said Monroe, feloniously took, stole and carried away a certain trunk and contents, of the value of five hundred dollars, the property of the said complainant, that thereupon said deponent issued a warrant for the apprehension of the said

Charles G. Irish—that said complainant took said warrant, and went, as this deponent understood, and now believes, in pursuit of the said Irish—that said Gen. Sutherland, as this deponent was informed, was very soon thereafter taken by the English, near the Canadian line, and that said warrant has never been returned to this deponent.

ABNER MORTON.

Subscribed and sworn to before me, this 4th day of June, A. D. 1838.

JAMES SHAW, *Justice of the Peace.*

STATE OF MICHIGAN, } ss.
Wayne County. }

I, Benjamin Chittenden, of the city of Detroit, in said county, being duly sworn, doth depose and say, that he is personally acquainted with Gen. Th. J. Sutherland, a prisoner in Canada, and was so acquainted with him, Gen. Sutherland, at the time and when he, Gen. Sutherland (in company with one Spencer,) left Gibralter, in a direction for Lower Sandusky, which was about 12 o'clock on the 4th of March, 1838; and about an hour and a half after their departure, he, this deponent with one David Thompson, left Gibralter in a sleigh for the city of Brest, lying about seven miles below Swan Creek, and that after travelling an hour or an hour and a half from Gibralter, he, this deponent, passed Gen. Sutherland and said Spencer on the ice, 7 or 8 miles below Gibraltar, and after so passing them, he, this deponent frequently stopped his horse and looked back, and saw Gen. Sutherland and Spencer, and being well acquainted with the course and distance from the mouth of the river to Point aux Pellee, he, this deponent, then observed to said Thompson, that by the direction of Gen. Sutherland and Spencer, they could not be bound for Point aux Pellee. This deponent further says that about four o'clock, P. M. of the same day, and after passing Point Mouillee, he, this deponent, saw Gen. Sutherland and Spencer about two and a half miles distance from said deponent, and evidently on our own waters, and far from the boundary line, he, this deponent saw Gen. Sutherland stop and stand still, and at the same time, he, this deponent, saw a sleigh with persons therein drive up to and arrest Gen Sutherland and Spencer, which sleigh, this deponent had for some time seen approaching them apparently direct from Malden, and this deponent further says that he is certain that Gen. Sutherland stopped some minutes before, and stood still until the sleigh drove up, and the persons therein arrested (both Gen. Sutherland and Spencer)—and that he, Gen. Sutherland did not run on the approach of the sleigh, as is reported to have been stated by Col. Prince, who arrested him.

And this deponent further says, that he was called upon for information relative to General Sutherland's arrest, and at request accompanied John Farmer, the Surveyor, on the 9th and 10th of March, 1838, for the purpose of examining the place of General Sutherland's arrest, and that although he, this deponent, signed a report, the result of said examination, as set forth in the affidavit of said Farmer; yet nevertheless, he, this deponent, upon mature reflection and deliberation entertains strong doubts about those being the tracks of Gen. Sutherland and Spencer, which he, this deponent pointed out to said Farmer, which he and said Farmer traced, and upon which the report of said examination was founded, as set forth in the affidavit of said Farmer: because this deponent was below Point Mouillee when he saw Gen. Sutherland and Spencer arrested, from which place this deponent is now confident he could not have seen Gen. Sutherland and Spencer when arrested, if arrested at the place of examination on the 9th and 10th of March, as set forth in the report of said examination, refered to in the affidavit of said Farmer.

And this deponent further says, that if those were the tracks of Gen. Sutherland and Spencer, which he pointed out to said Farmer at the time of the examination on the 9th and 10th of March, that then he, this deponent is clearly of the opinion that the thaw which had taken place subsequent to the arrest, but previous to the examination must have so obliterated the impression of Gen. Sutherland's and Spencer's tracks at and beyond the place of examination, as to have prevented the tracing of them to the place of arrest. This deponent thinks the appearance of the sleigh tracks refered to in the report, could not have been that of Prince's, and that if those were the tracks of Gen. Sutherland and Spencer refered to in the report of the examination, that then Gen. Sutherland and Spencer must have changed their direction at the place of examination, and proceeded towards a certain vessel which was frozen in the ice, and the only one at the head of the Lake—and which said deponent saw during the examination on the 9th and 10th of March, and which said deponent should think, and know was five or six miles distant—and as far as the eye could reach. If this was the vessel within half a mile of which it is reported that Prince has stated he arrested Gen. Sutherland, and being the only one in that vicinity, then he must have been arrested on our own waters, for this deponent thinks said vessel was not less than two and a half or three miles westerly of and from the boundary line.

BENJAMIN CHITTENDEN.

Sworn and subscribed before me,
this 22d day of June, 1838.
J. W. Hidug.

STATE OF OHIO, } ss.
Lucas County, }

Ira Smith of the city of Toledo, in said county, being duly sworn, deposeth and saith, that he is acquainted with General Th. J. Sutherland, and was so acquainted with him before and at the time of the disturbances in Canada. That he knows the time when he, Gen. Sutherland, was engaged in said contest—that he saw him, Gen. Sutherland, at Toledo aforesaid, soon after the troubles in Canada aforesaid began to assume a serious aspect. That at that time he stated to this deponent he had authority to take the command of a force that was to be concentrated at or near Malden for the purpose of aiding the force there stationed on Navy Island. That he, Gen. Sutherland, left Toledo as he stated for the aforesaid spot—that he saw no more of him until the evacuation of Navy Island, and the moving of a portion of the forces stationed there after on to Fighting Island (or some other point near Malden.) That he, Gen. Sutherland, then returned to Toledo, having resigned and disconnected himself wholly from the Patriots—and having received his discharge, which he exhibited to this deponent, and at the same time stated that he should engage no more in said contest. That soon after Gen. Sutherland left this city in company with this deponent, for the city of Monroe, expecting to find his baggage at that place. On arriving at Monroe, he, Gen. Sutherland, found his baggage had been stolen or taken from the Monroe House by one Charles G. Irish, and as we were informed had gone to the city of Detroit; when Gen. Sutherland took out a warrant before Abner Morton, Esq. a Justice of the Peace of said county, and proceeded to Detroit in search of the said Irish, and as this deponent is informed, he Gen. S. not finding his baggage at the city of Detroit and being informed that the said Irish had left for Lower Sandusky and taken the route around the head of Lake Erie—he, Gen. S. thought it advisable to cross the head of the Lake, saving the distance of 60 or 70 miles, and by so doing arrive at Lower Sandusky as soon as the said Irish; and when so crossing the Lake was kidnapped by one John Prince and a number of others doubly armed for that purpose, and carried off from our own waters as this deponent is informed—they were on a direct line from Gibralter to Lower Sandusky, which is many miles on the American side of the line.

And this deponent further says, that he saw him, Gen. Sutherland, in Toledo on the day of the engagement on Fighting Island, and believes he was at this time entirely ignorant of all the movements of the "Patriots," (as they were called.) And this deponent further says that he has every and abundant reason for believing that he, Gen. Sutherland, had no connection with, or knowledge of the Patriots

collected upon Point aux Pellee Island, and is confident that he, Gen. Sutherland, was not on the island at any time during the winter of A. D. 1837—8; and further, that this deponent is well satisfied and believes that he, Gen. Sutherland was not in any engagement between the Patriots and the British subjects.

IRA SMITH.

Sworn and subscribed before me, a Notary Public, in and for said county, duly commissioned and sworn, on this 31st day of May A. D. 1838, at the city aforesaid.

STATE OF MICHIGAN, } ss.
Wayne County, }

I, John Farmer, of the city of Detroit, in said county, being duly sworn, doth depose and say—that on the 9th day of March 1838, he, this deponent received an order from the Governor of this State requiring him, (this deponent) as surveyor, to take immediate measures to ascertain whether the arrest of Thomas J. Sutherland, a citizen of the United States, occurred within the jurisdiction of said State.

This deponent further saith, that he was at said city of Detroit on the 4th of March 1838, the time he, Gen. Sutherland, was arrested by the British authorities—that he was therefore ignorant of the place of his arrest, and consequently had to refer to others for information: And as it was reported "that Benjamin Chittenden and David Thompson had stated that they saw Gen. Sutherland at Gibralter on the 4th of March last, the day of his arrest; that they also saw him with a person supposed to be Spencer, leave our shore on foot upon the ice, in a direction for Lower Sandusky, and that some time after the departure of him, Gen. Sutherland and Spencer, they, Chittenden and Thompson started in a sleigh from Gibralter on the ice for the city of Brest, and that after passing Point Mouillee, and about three or four hours, after the departure of Gen. Sutherland and Spencer, they, Chittenden and Thompson saw them about two and a half miles distant, and evidently on our waters, overtaken and arrested by persons in a sleigh apparently direct from Malden." Therefore this deponent sought for, but not being able at that time to find Thompson, he called upon said Chittenden *only*, who not only confirmed said report, but also stated to this deponent that he presumed that he could find the tracks of Gen. Sutherland and Spencer on the ice, by

tracing which this deponent might arrive at the place of their arrest; this deponent therefore employed said Chittenden, and also one E. S. Lathrop to assist him, and having provided himself with instruments for the purpose of determining accurately the situation of the place of arrest, providing its proximity to the national boundary line should render its jurisdiction uncertain or doubtful; he, this deponent, with said Chittenden and Lathrop proceeded forthwith to Gibralter, thence by the direction of Chittenden to a place on the ice below Gibralter where said Chittenden pointed out to this deponent the tracks of two persons leading towards the Canada shore, which were then supposed to be the tracks of Sutherland and Spencer; they were parallel and about three or four feet apart—those made by the person who had walked on the upper side were much larger of the two, confirming what Chittenden had previously stated, to wit—that Gen. Sutherland was much the larger man of the two and walked on the upper side. These tracks this deponent traced to their termination, as he then supposed, a short distance from which, was a sleigh track apparently from Malden; but which this deponent could not arrive at nor examine, on account of the holes in, and the decomposition of the ice at this place, which was exceedingly rotten and covered from six to ten inches with water. This place this deponent and also Chittenden and Lathrop then concluded was the place of Gen. Sutherland's and Spencer's arrest. It was, in the opinion of this deponent, within one and a half miles of the Canada shore, and in full view of Malden; the Queen's store house at which place could be distinctly seen between the main shore of Canada and Bois Blanc Island, and the light house on said Island bore north five degrees east. This place then, supposed to be the place of his arrest, was so evidently, within the jurisdiction of Canada, that this deponent, and also said Chittenden and Lathrop, deemed an actual survey and measurement entirely unnecessary. This deponent therefore drew up a report at the time, setting forth the result of said examination as aforesaid, which was signed by this deponent, and also by said Chittenden and Lathrop and which he, this deponent, delivered to the Governor, a copy of which this deponent has not preserved, because he then believed that that was the place of Gen. Sutherland's arrest—and that it was so evidently within the boundaries of Canada, that its jurisdiction would not and could not be questioned. But as said Chittenden has, since the making of said examination, and the said drawing up and signing of said report, stated to this deponent that he, Chittenden, upon more mature reflection, entertains strong doubts about those being the tracks of General Sutherland and Spencer which he pointed out to this deponent at said examination; and that if they were, that he, the said Chittenden, is of the opinion that the

heavy thaw which succeeded their arrest, must have so obliterated the tracks at the time, and especially at the place of said examination as to have prevented our perceiving them further, and consequeutly have prevented tracing them to their ultimate termination, the place of their arrest; assigning as a reason that Gen. Sutherland and Spencer had been travelling quite rapidly for three or four hours on the ice when they were overtaken and arrested, and that consequently they must have proceeded further than four or five miles at the time of their arrest; and said Chittenden alleged as a further reason that he and said Thompson could not have seen them from Point Mouillee when arrested if they were arrested at the place of said examination.

This deponent would therefore also observe that if those were the tracks of Gen. Sutherland and Spencer, and if they were beyond the place of said examination, that he, this deponent is fully of the opinion, that the ice, at this place and immediately beyond in its vicinity, was so extremely rotten and full of holes, as to have rendered it very hazardous, if not impossible to have pursued them further, even if their tracks had continued visible. And this deponent would further observe that the snow which had been quite deep on the ice at the time of their arrest, was at and beyond, in the immediate vicinity of said examination, so nearly exhausted by the thaw which succeeded their arrest, and the ice at this place was so covered with water, so open in spots and filled with air-holes, in a certain direction, that this deponent is of the opinion that the tracks of General Sutherland and Spencer would not have been legible further, if they had continued on from this place in the same direction, or if they had turned towards the centre of the Lake, or towards a certain vessel lying in sight of, and about five or six miles from this place, but their tracks would have been legible if they had here turned towards the American shore. It is therefore possible (even if those were their tracks,) that this was not their termination, or the place of their arrest, as they might have turned at or in the vicinity of this place towards and in the direction of a vessel frozen in the ice, which this deponent saw and should think was about five or six miles distant. If this was the vessel, (and this deponent saw no other) within half a mile of which it is reported that Prince states he arrested Gen. Sutherland, and if he was arrested within half a mile of this vessel, then this deponent has no doubt he was arrested within the jurisdiction of the United States; for this deponent is clearly of opinion that this vessel lay at least a mile and a half, if not more westerly of the national boundary line. This deponent would also further observe that in his opinion it would have been utterly impossible for said Chittenden and Thompson to have seen the arrest

of Gen. Sutherland and Spencer by the British from Point Mouillee, if they were arrested at the place of said examination aforesaid, and further this deponent saith not.

JNO. FARMER, *Surveyor.*

Detroit, June 21, 1838.

Sworn and subscribed before me, this 21st day of June, 1838.

D. E. HARBAUGH, *Justice of the Peace.*

TO HIS EXCELLENCY, MARTIN VAN BUREN, PRESIDENT OF THE UNITED STATES OF AMERICA,

The undersigned, now a prisoner in the gaol of the city of Toronto, Upper Canada, would respectfully represent to your Excellency, that he is a citizen of the United States, a native of the city of Albany, State of New York,—a son of Ambrose Spences, late Chief Justice of said State of N. York—and that he sometime in the month of February last arrived at Detroit, in the State of Michigan, where he became acquainted with Gen. Th. J. Sutherland, of the Patriot Army of Upper Canada, and from whom he then learned, that he, (Gen. Sutherland) had resigned his command with the Patriots—and was about to return home. That about the first of March, he was informed by Gen. Sutherland that he, Gen. Sutherland, had been robbed of his trunk, containing his clothes and papers of value, by persons known to the undersigned, which induced him to tender his services to Gen. Sutherland for aid in the recovery of his property. That the persons whom it was believed had committed the robbery had fled, as it was supposed, towards Sandusky, Ohio, by way of Perrysburg: and for the purpose of intercepting them, he proposed to cross the ice at the head of Lake Erie, from Gibralter, Michigan, directly to Sandusky City, which might be done on foot—and Sandusky arrived at by one third the distance or less than the route by Perrysburg, Ohio, which Gen. Sutherland consented to undertake with him.

That for this purpose the undersigned with Gen. Sutherland, and no other person in company on the 4th of March last, at about 12 o'clock M. we left Gibralter and travelled down upon the ice towards Sandusky, keeping the whole time several miles towards the American shore from the channel of the waters. That at about half past four o'clock, P. M. of the same day, when he and Gen. Sutherland had arrived within about half a mile of a schooner which being frosen in the ice, a little west of the island called the West Sister—they were

both arrested by one John Prince, a member of the Provincial Parliament of Upper Canada, Colonel in the Militia, and Justice of the Peace of the same, assisted by an armed body of men, and conveyed from thence to Fort Malden, and then to this city. That at the time of our capture, we were so near the West Sister as plainly to observe the trees singly thereon, and so far from the shores of the United States, and of Canada, that we could see no specific objects there. That when we first discovered the sleighs in which Prince and his party, pursued us and when they had gained more than two-thirds of the distance between us and the Canadian shore, they were so far from us that we could not distinguish their character, and supposed the sleigh and teams to be but individuals on foot, as we were ourselves. That from an examination of the maps, and as we believed at the time we were captured, several miles within and towards the American shore from the boundary line between the two countries, and that at the time of our capture, neither Gen. Sutherland nor the undersigned were connected with any Patriot force, or rebel subjects of Her Majesty the Queen of Great Britain. That they had no arms with them except two old swords which Gen. Sutherland had picked up by the way from Detroit as his property, and which were in themselves inoffensive weapons.

And the undersigned would further state to your Excellency that upon being brought to this city, he was confined with Gen. Sutherland in the garrison—from whence in a few hours on the same day of our arrival, the undersigned was removed from Gen. Sutherland at the garrison to the gaol, where he was met by Robert B. Sullivan, President of the Executive Council of this Province, who then took him into a private room, and showed him a letter to himself (Mr. S.) from Sir F. B. Head, directing the ordering of a Court Martial for the trial of Gen. Sutherland and himself. Mr. Sullivan then said to me "have you any thing to say which would clear yourself—a Court Martial has been ordered for your trial as you see, and under the circumstances it will be all but an impossibility for you to escape, and if you will give evidence against Gen. Sutherland, it is the only means you can rely upon for your life, as he, Gen. Sutherland certainly must die!" Mr. Sullivan also urged me to agree to "testify against Gen. Sutherland, that he was going to Pellee Island when captured--on which there was or lately had been an armed body of Patriots." He desired me also to testify "that when captured he was within the lines of the British province," which the undersigned declined. That during the progress of Gen. Sutherland's trial before a Court Martial in this city, Mr. Sullivan came to the undersigned at five or six different times, and desired and urged him to go before the Court Martial and testify to the matters above stated,

as requested, against Gen. Sutherland, which he refused to do, as the same was not in accordance with truth.

And the undersigned would further state that from the time that he was removed from the company of Gen. Sutherland until the close of his trial, he was treated with all the favor and attention that could be bestowed upon him, which were withdrawn, and he reduced to the condition of other prisoners confined in the gaol—and in which state he now remains—as soon as the trial was over, and during which time he had no communication with Gen. Sutherland or his friends.

The undersigned would further state that he has not been put upon any trial before any Court Martial, and that the Court before whom Gen. Sutherland was tried has been dissolved, after sentencing him "to be transported to one of Her Majesty's Islands during his natural life," and that he was not sworn or examined as a witness on said trial.

S. M. SPENCER.

Dated Toronto, April 21, 1838.

We whose names are hereunto subscribed, do certify and state that we have heard the above written matters read to, and in the presence of Silvanus M. Spencer, now a prisoner in the goal of Toronto, and we saw him at the same time subscribe his name thereto, and affirm and declare that all the facts set forth in the above writings were true and correct:

April 21, 1838.

HENRY JOHNSON,
CLAUDE COMPEAU,
W. W. DODGE,
HENRY W. JOHNSON,
PHILIP WIDEMAN,
JAMES BROWN,
GODLIP ECKARDT,
CHARLES LOW,
BARTHOLOMEW PLANTE,
STEPHEN B. BROPHY,
DAVID PORTER,
ROBERT TAYLOR,
A. D. BORDINEAU,
JOHN WILKIE.

JAMES JOHNSON.